DOCUMENT RESUME

ED 463 386 UD 034 917

AUTHOR	Piche, Dianne M., Ed.; Taylor, William L., Ed.; Reed, Robin A., Ed.
TITLE	Rights at Risk: Equality in an Age of Terrorism. Report of the Citizens' Commission on Civil Rights.
INSTITUTION	Citizens Commission on Civil Rights, Washington, DC.
SPONS AGENCY	Spencer Foundation, Chicago, IL.; Annenberg Foundation, St. Davids, PA.; John D. and Catherine T. MacArthur Foundation, Chicago, IL.; Ford Foundation, New York, NY
PUB DATE	2002-00-00
NOTE	351p.; Published biennially. For other reports in this series, see ED 429 150 (1999); ED 407 476 (1997); ED 439 988 (1995), ED 343 986 (1991); and ED 319 835 (1989).
AVAILABLE FROM	Citizens' Commission on Civil Rights, 2000 M Street, Ste. 400, Washington, DC 20036 ($15). Tel: 202-775-8822; e-mail: citizens@cccr.org; Web site: http://www.cccr.org. For full text: http://www.cccr.org/RightsAtRisk.htm.
PUB TYPE	Books (010) -- Collected Works - General (020)
EDRS PRICE	MF01/PC15 Plus Postage.
DESCRIPTORS	*Affirmative Action; *Civil Rights; Diversity (Student); Educational Policy; Elementary Secondary Education; *Equal Education; *Equal Opportunities (Jobs); Federal Government; Federal Legislation; Gender Issues; High Stakes Tests; Higher Education; Hispanic Americans; Homosexuality; Limited English Speaking; Minority Group Children; *Minority Groups; Political Issues; Racial Discrimination; Special Education; Urban Areas; Violence; Voting Rights
IDENTIFIERS	Bush Administration; Clinton Administration; Congress; Criminal Justice System; Equal Employment Opportunity Commission; Fair Housing Laws; Hate Crime; Office of Federal Contract Compliance Programs; Supreme Court

ABSTRACT

This volume chronicles the progress of the administration, executive branch agencies, and Congress in ending discrimination and advancing civil rights. The study has 21 chapters in 2 parts. Part one includes: (1) "Rights at Risk"; and (2) "Recommendations of the Commission." Part two includes a series of working papers prepared by leading civil rights and public interest experts: (3) "Federal Judicial Nominations and Confirmations during the Last Two Years of the Clinton Administration" (Elliot M. Mincberg); (4) "Recent Supreme Court Decisions Affecting Congress' Ability To Redress Employment Discrimination" (Michael H. Gottesman); (5) "The New Legal Attack on Educational Diversity in America's Elementary and Secondary Schools" (John Charles Boger); (6) "Diversity in Higher Education: A Continuing Agenda" (Arthur L. Coleman); (7) "Urban Fragmentation as a Barrier to Equal Opportunity" (John A. Powell and Kathleen M. Graham); (8) "Federal Fair Housing Enforcement at a Crossroads: The Clinton Legacy and the Challenges Ahead" (John P. Relman); (9) "The Current Civil Rights Challenge for the Growing Latino Community: Inclusion and Participation in Political Life" (Marisa J. Demeo); (10) "Voting Rights" (Armand Derfner); (11) "Affirmative Action in Public Contracting: The Final Years of the Clinton Administration" (Georgina Verdugo); (12) "Equal Employment Opportunity: EEOC and OFCCP" (Nancy Kreiter); (13) "Federal Action To Confront Hate Violence in

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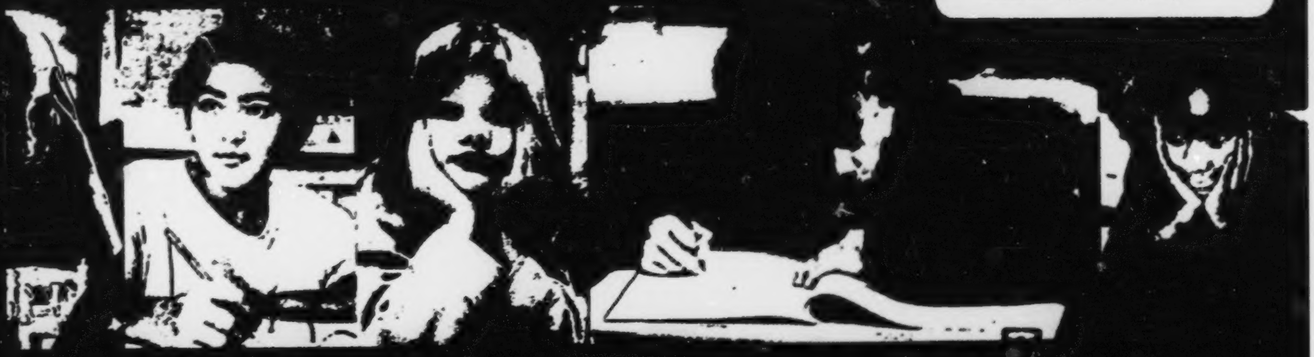

Citizens' Commission
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Rights at Risk:
Equality in an Age of Terrorism

Dianne M. Piché, William L. Taylor, and Robin A. Reed, Editors

Report of the Citizens' Commission on Civil Rights
2002

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Cover design by Rock Creek Publishing Group, Inc.
Cover photography by Rick Reinhard.

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Library of Congress Card Number: 2001099766
Library of Congress Cataloging-in-Publication Data

Citizens' Commission on Civil Rights (U.S.)
Rights at Risk: Equality in an Age of Terrorism
Report of the Citizens' Commission on Civil Rights/Dianne M. Piché, William L. Taylor, and Robin A. Reed, editors. p. cm.

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Published by Citizens' Commission on Civil Rights

Acknowledgments

Many people contributed to the creation of this report. Dianne M. Piché, the Commission's Executive Director, worked closely with many of the authors, helped develop the Commission's recommendations, and wrote and edited portions of the report. William L. Taylor, the Acting Chair of the Commission, also worked closely with authors, wrote and edited portions of the report and provided overall guidance to the project. Robin A. Reed, the Commission's Project Coordinator, managed the production of the report, including formatting and page design. She also assisted in communicating with authors, drafting recommendations, editing and proofreading, and keeping us all on a tight schedule.

Toinette Marshall provided valuable administrative support to the editors during the preparation of the report. We also wish to acknowledge the many contributions to the report, including expertise on education and criminal justice issues, made by Pamela Cherry. Thanks also to Kathy Downey for her ongoing assistance to the Commission.

The Commission also appreciates the contribution made by several leading experts, including some of our authors, who consulted with members of the Commission in early 2001 as this report was developed. They include: Marisa Demeo, Ralph Neas, Elliot Mincberg, John Relman, Ron Weich, and Chester Hartman.

The Commission also extends its thanks to Rock Creek Publishing Group, Inc., for their cover design, to Rick Reinhard for his photography, to Mary McLaughlin for her proofreading skills, and to Sheppard Ranbom and his colleagues at Communication Works LLC for their assistance in drawing public attention to the Commission's work.

A very large debt of gratitude is owed to the many authors whose contributions form the core of this report.

This report would not have been possible without the support of the Ford Foundation. The Commission expresses its appreciation to Alan Jenkins of the Ford Foundation for his continuing commitment to the Commission's work. The Commission is also grateful to the MacArthur, Spencer, and Annenberg Foundations for their support of our programs in the area of public education.

Foreword

The Citizens' Commission on Civil Rights is a bipartisan organization established in 1982 to monitor the civil rights policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights.

This volume is the seventh in a series of reports published since 1989 that chronicle the progress of the incumbent administration, executive branch agencies and Congress in carrying out both their moral and legal duties to end discrimination and to advance civil rights and opportunity for all Americans. These reports include: *The Test of Our Progress: The Clinton Record on Civil Rights* (1999), *The Continuing Struggle: Civil Rights and the Clinton Administration* (1997), *New Challenges: The Civil Rights Record of the Clinton Administration at Mid-term* (1995), *New Opportunities: Civil Rights at a Crossroads* (1993), *Lost Opportunities: The Civil Rights Record of the Bush Administration Mid-term* (1991), and *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* (1989).

This study has two parts. Part One consists of the report and recommendations of the members of the Commission, a diverse and distinguished group of former government officials and leaders in business, education, and religious and civic life. Part Two is a series of working papers prepared by leading civil rights and public interest experts. Several of these authors contributed to earlier works of the Commission. While the Commission sought out and publishes these papers in order to advance public knowledge and understanding of a broad cross-section of civil rights issues, the views expressed in each paper represent those of the author/s and not necessarily of the Commission as a whole or any of its individual members.

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Part One:

Report and Recommendations of the Citizens' Commission on Civil Rights

Chapter 1

Rights at Risk

In June 1997, then-President Bill Clinton launched his "Initiative on Race," saying such a national effort "is the unfinished work of our time, to lift the burden of race and redeem the promise of America."

Today those words echo as a distant memory. The Clinton initiative faltered and faded from public consciousness. Then soon after we entered the new millennium with a new Administration, the nation was confronted with the shock and tragedy of the September 11 terrorist attacks. The urgent need to protect national security and combat terrorism understandably became all-consuming and seemed to blot out other concerns.

Now, as the Bush Administration enters its second year, an economic decline and domestic tax policies may curtail government resources needed to combat discrimination and to provide assistance to the disadvantaged. Racial and other forms of discrimination appear to have faded from national consciousness, even as remedies for denials of equal opportunity receive unfriendly attention from the courts and the executive branch.

I. The Judicial Assault on Rights

Perhaps the most far-reaching assault on civil rights remedy is the judiciary's dismantling of the principles of affirmative action that had guided previous decisions — the idea as expressed by former Justice Harry Blackmun that "in order to get beyond race we must first take race into account." Taking a cue from the five-Justice majority that has ruled against race-conscious action in several cases, some lower courts have gone even further to strike down voluntary efforts by colleges and universities to pursue policies of diversity and inclusiveness in admitting students. A similar assault is taking place in the area of elementary and secondary education.

In the 1990s, the conservative Supreme Court majority issued three decisions closing the books on court-ordered desegregation with the proposition that if school officials were acting in good faith courts should relinquish jurisdiction even if vast educational inequities remained.

Now, some federal courts have gone a step further and said that school officials may not act *voluntarily* to avoid racial isolation of schools (through such devices as magnet schools) even when they justify their policies as educationally and socially sound.

These decisions have reversed the progress of earlier years and led to a trend toward resegregating America. That trend has been reinforced by failures to fully enforce the fair housing laws and by the dissolution of federal programs designed to give low-income people access to affordable housing outside areas of highly concentrated poverty. At the same time new patterns of urban sprawl have succeeded the suburbanization trends of the 1940s, 1950s, and 1960s. Increasingly, large numbers of affluent whites have found homes far from central cities and jobs to accommodate them have been located along interstate highway corridors. The results, in addition to inefficient use of resources, have been segregation and lack of access by low-income people of color to jobs and services. Dialogue about how to change this through "smart growth" policies seems not to be high on government's agenda.

The Supreme Court's assault on civil rights remedies has not been limited to decisions curbing affirmative action. Among the most important decisions of the Burger Court during the 1970s were opinions affirming that the Civil Rights Act of 1964 prohibited not simply acts of deliberate discrimination but practices that had an adverse impact on minorities and women that could not be justified as necessary to the operation of a business or other institution. So, for example, if a police or fire department imposed height, weight, or strength requirements for recruits that disadvantaged women and could not be justified as necessary to performance of the job, these would be struck or modified under Title VII of the 1964 Act. If a public school consigned children to a dead-end track for "educable mentally retarded" without considering whether they might succeed better if mainstreamed, the tracking could be treated as a violation of Title VI of the 1964 Act.

When the Court wavered in this view in the 1980s, Congress passed the Civil Rights Act of 1991, specifically affirming its purpose to provide a remedy for nonpurposeful discrimination.

But in 2001, the Court's five-member majority again curbed the right of people suffering such discrimination to obtain a remedy under Title VI of the Civil Rights Act of 1964, holding that a Latino woman had no right to challenge in court an Alabama law that barred non-English speakers from obtaining driver's licenses. Even if the Bush Administration decides to enforce Title VI with vigor, a proposition by no means certain, hundred of thousands of people who are subjected to discrimination in education, housing, transportation, the administration of justice, and many other areas will be stripped of a remedy.

The Court majority has not stopped at narrowing long accepted interpretations of the rights declared by the Constitution and Congress; it has also challenged the authority of Congress and state legislative bodies to enact protections for civil rights. Thus in two cases radically reinterpreting the 11th Amendment, the five-member majority has held that state officials are sovereignly immune from damage suits for their acts of discrimination against older people and people with disabilities.

So, too, the same majority has decided that the Commerce Clause, long accepted as a basis for federal laws protecting the social and economic interests of individuals, could not provide a basis for a law prohibiting violence against women.

Similarly, although section 5 of the 14th Amendment grants Congress affirmative power to implement the Amendment's protections, the Court majority has decided that extensive hearings and findings by Congress may not justify some laws providing a right of action against discrimination.

In sum, a narrow majority of the Supreme Court has begun over the last decade to reshape American jurisprudence in ways that thwart individuals seeking to participate fully in society and that squelch the efforts by coordinate branches of government to remove barriers to equal opportunity.

The judicial nominations that President Bush will make during his term in office and how the Senate uses its advice and consent powers will determine whether this trend will continue far into the future or whether some balance will be restored to the Courts' decision-making.

II. The First Months of the Bush Administration

On the crucial question of judicial appointments, the direction of the Bush Administration seems ominous. The President said as a candidate that he would seek to appoint more justices like Antonin Scalia and Clarence Thomas to the Supreme Court. His Administration ended the role that the American Bar Association had played for half a century in screening the qualifications of candidates and sought the advice of the right-wing Federalist Society in finding nominees. And the early nominations of Mr. Bush to key positions on Circuit Courts of Appeals included people with long records of opposing the use of federal authority to protect civil rights.

While many senators have professed concern about the direction of the federal courts, they have been reluctant to state clearly that they would oppose nominees whose record and philosophy demonstrate an unwillingness to protect the least powerful members of American society. If senators mount only token resistance to the apparent Bush Administration strategy of filling appellate vacancies with nominees who mirror the views of Justices Scalia and Thomas, erosion of the promise of equality of opportunity will continue.

In its appointments of persons to key civil rights positions in the executive branch, the Bush Administration appears to have adopted a policy of populating henhouses with foxes. One exception is the nomination of an experienced person with a strong civil rights background as Chair of the Equal Employment Opportunity Commission. But the pivotal job of Assistant Attorney General for Civil Rights at the Justice Department has been filled with a person who has very little experience in the area. He reports to an Attorney General with a history of defying civil rights laws and must work with a Solicitor General who has a record of opposing civil rights remedies in the courts. And, reportedly, he has been surrounded in the Division with members of the Federalist Society whose mission is to narrow the application of civil rights laws. While it is still early in the Administration, the decision of the Civil Rights Division to withdraw support in a court of appeals from an important claim of sex discrimination in employment may be a harbinger of things to come.

Similarly, the Administration has successfully nominated a General Counsel at the Department of Education and is seeking confirmation as Assistant Secretary for Civil Rights two people who are on record as opposing major remedies the Department employs in implementing the civil rights laws. Both lack any experience in the field of education. One important issue pending at the Department is whether to issue guidance on testing to school officials throughout the nation. The guidance, adopted by the Clinton Administration after careful study, calls upon educators to ensure that tests that may have an adverse impact on students of color or those with disabilities or limited English proficiency meet professional standards of validity, reliability, and fairness.

Although it was supported by all major education associations, civil rights groups and test publishers, the Bush Administration withdrew the guidance and put it on the shelf presumably for further study. If the stated opposition of the Bush Administration nominees to remedies for nonpurposeful discrimination is allowed to prevail, the cause of education reform espoused by the Bush Administration, as well as fair treatment for students, will receive a setback.

Other policies being pursued by the Bush Administration threaten the interests of minorities and the poor. When the new century began, surpluses in the federal budget encouraged many to believe that new investments in employment, education, housing and health could provide opportunity for those worst off in American society. Now, an economic recession, the costs of defending against terrorism, and — most of all — a huge tax cut sought and obtained by the Bush Administration for the direct benefit of the affluent have wiped out the surplus and all but extinguished the hopes of many who would have benefited by an investment in their futures. Further, steps taken by the Administration to dismantle or water down regulatory protections of the environment and of the health and safety of workers are having disproportionately adverse impacts on people of color and the poor.

In the area of administration of justice, concern about such matters as racial profiling and the detention and deportation of immigrants on insubstantial grounds appears now to have been overshadowed by the fears generated by the September 11 attacks.

Finally, whatever one's view of the legitimacy of the outcome of the November 2000 election it is clear that people of color are still disproportionately disenfranchised by outmoded voting equipment and local prejudice or indifference.

III. The Road Ahead

During his Administration, President Bill Clinton held the banner high for the loftiest goals of equal opportunity. He told young people that:

> *[T]he alternative to integration is not isolation or a new separate but equal; it is disintegration.*

His policies sometimes failed to match his rhetoric. Provisions he sponsored or agreed to in the welfare reform and immigration laws have added misery to the lives of many poor women and children and people of color. He appeared to lack the will to fight for the confirmation of his court nominees. But he preserved government's positive approach to protecting the rights of its people by "mending" rather than "ending" affirmative action policies. And through strong and capable appointments in key areas of the executive branch he helped ensure that civil rights laws would be enforced to provide opportunities for those who had suffered discrimination.

Like his predecessor, George W. Bush appears to have an understanding of the sensibilities and concerns of disparate groups of people. In his successful campaign for an education reform bill he spoke often of the "soft bigotry of low expectations" of poor children and children of color. In the aftermath of September 11, he sought to ward off racial recriminations by appealing for fair treatment of Muslim and Arab Americans.

But Mr. Bush's open and positive views stand in stark contrast to the declared agenda of the core of his political party. That core seems determined, with the President's concurrence, to reshape the federal courts so as to undo the civil rights and social justice gains of the last half of the 20th century. It seems determined to pursue legislative and executive policies that will widen the gap between the haves and have-nots. These results are not inevitable. Occasionally, the advocates of more positive social and economic policies prevail, as when the Bush Administration recently advocated a restoration of food stamp benefits to noncitizens.

But the trend is unmistakable. What is needed now is a conscious, bipartisan effort to restore momentum and balance to the nation's quest for opportunity for all its people. Lacking this, we may awaken some day from our understandable preoccupation with national security to find ourselves a nation more divided, less equal — and therefore less secure — than before.

Chapter 2

Recommendations of the Commission

The Citizens' Commission offers the following recommendations:

Presidential Leadership and Appointments

1. Secure Judges Committed to Equal Justice

We recommend that President Bush require his future nominees to have a demonstrated commitment to equal justice under law. In seeking out qualified candidates the President should hold genuine consultations with both Democratic and Republican senators. He should also consult with a wide range of scholars, respected lawyers, and civil rights experts to determine the likely impact of proposed nominations on his stated goal of securing equality of opportunity for all persons.

We recommend to the Senate, and particularly to Senate leaders and members of the Judiciary Committee, that they carefully and thoroughly review the President's nominees, especially nominations to the appellate courts, to determine whether these nominees have a demonstrated commitment to equal justice under law. Where senators conclude that a nominee lacks such a commitment they should vote against confirmation.

A narrow majority of Supreme Court justices, along with many appellate judges named during the 1980s, has seriously eroded the civil rights protections secured by Congress and the courts beginning with *Brown v. Board of Education*. The trend of the decisions is to restrict the authority of other branches of government to protect rights and to move the nation toward resegregation and the constriction of opportunity.

We hope that the President will take a long, hard look at the mismatch between his rhetoric on fairness and opportunity and the ideology of many of the people he has nominated to the courts in his first year of office. Whatever the President does, the Senate should exercise its role as a full partner in the judicial appointment process. In the words of *The New York Times*, senators should not "move aside passively for confirmation of ideological jurists" whose appointment "could distort the balance of the judiciary for decades to come."

2. Establish a Vigorous Civil Rights Enforcement Program

a. We recommend that the President appoint or nominate to key civil rights positions in the executive branch people experienced *in the field who are committed to strong enforcement.*

President Bush has already nominated one such person as Chair of the Equal Employment Opportunity Commission. But he has also sought — particularly for the position of Assistant Secretary of Education for Civil Rights — to appoint persons opposed to the very laws they would be charged with enforcing. The time has also long passed when a lack of experience or commitment in civil rights can be regarded as an asset. The President should understand that the true test of his verbal professions on civil rights will be the appointment of people fully prepared to match his words with Administration deeds.

b. The President should vest civil rights responsibility with an official in the White House who reports directly to the President and whose responsibility should include providing guidance and direction to agency and department heads.

The lack of such leadership has been a failure of several Administrations. But the need is greater than ever to develop cohesive civil rights policies, to provide coordination where civil rights issues cross departmental lines, and to furnish guidance and assistance, particularly on controversial and sensitive issues.

c. The President should provide the tools and resources for civil rights enforcement. We recommend that the President send a clear message to all federal departments and agencies that he expects the civil rights laws to be vigorously enforced. The Administration and Congress also should ensure that the enforcement agencies have the resources they need to carry out their responsibilities.

Effective law enforcement is not possible without adequate resources. During the 1980s, the Citizens' Commission documented a decline in civil rights enforcement marked by decreased resources, failures to investigate and monitor, and failures by enforcement agencies to collect the data necessary to assess compliance. Some of these problems were addressed in the 1990s but resources still are not sufficient.

The Commission is particularly concerned about the Attorney General's statement in November 2001 that he would consider diverting staff and funding from civil rights enforcement to support the Administration's battle against terrorism. The need to combat terrorism and to protect our national security should not become a pretext for cutting back on the resources needed by the Justice Department's Civil Rights Division for vigorous and effective enforcement of anti-discrimination laws. Similarly, a weakening economy and compelling national security interests should not provide an excuse to fail to support either the congressional appropriations or the high-quality executive branch leadership needed to carry out the various federal agencies' civil rights enforcement obligations.

d. We recommend the use of affirmative remedies for violations of civil rights laws and encourage use of voluntary affirmative action plans.

President Bush should direct federal departments and agencies to continue the policies of his predecessor in support of affirmative action. Specifically, the Administration should continue to use affirmative remedies for violations of civil rights laws and should encourage the use of voluntary affirmative action plans. Federal departments and agencies (including the Office of Federal Contract Compliance Programs) should continue to employ and *should defend affirmative action programs and remedies.*

If there is any lesson to be learned from the civil rights history of the last half-century it is that court decisions and laws are of little practical value to persons who have suffered discrimination until there are affirmative remedies to afford opportunity. This has proved to be the case in education, in employment, in housing, and many other areas. Now we have evidence that when in the name of "color blindness" affirmative remedies are dismantled, opportunities will be rapidly lost. In the 1990s, the federal government mended affirmative action so that it would continue to provide opportunity to those once denied without unduly trammeling the interests of others. Those policies should be continued.

3. Develop a Comprehensive Policy to Provide Opportunity to Disadvantaged Persons

We recommend that the President develop a comprehensive policy designed to provide economic and educational opportunity, particularly for those who live in high concentrations of poverty in inner cities, as well as the poor in rural areas.

It is incontestable that even in economic good times there are millions of people in this nation who remain trapped in poverty or in dead end jobs without the means to advance by dint of their own efforts.

Often the poor are faced with structural barriers that must be eliminated if they are to have a chance to succeed. For example, the large concentrations of poverty in which many African Americans, Latinos, and Native Americans (along with some recently-arrived Asian immigrants) live effectively deny them access to educational and job opportunities that they need to progress.

A comprehensive federal policy to address these barriers should include programs and initiatives in the following areas:

- *Housing*: The federal government should substantially increase the supply of affordable housing available to low and moderate income families and ensure that such housing is sited throughout metropolitan areas to give people access to jobs and services. Such a policy would also step up fair housing enforcement and promote smart growth policies that will make efficient and equitable use of urban resources.

- *Education*: In the area of education, a comprehensive urban policy would assist local school authorities in fighting off attacks in the courts on their policies of diversity and desegregation. It would call for strong enforcement of the No Child Left Behind Act of 2001 to ensure that school officials are held accountable for the progress of poor children. It would provide choice for children attending failing public schools to enroll in better performing public schools throughout the area.

- *Health and Social Services*: The policy should address such other basic and critical needs as health treatment and immunization, adequate nutrition, and childcare. It should ensure that welfare reforms provide practical opportunities for poor women and their children to become self-sufficient.

- *Jobs and Economic Opportunity*: The policy should ensure job training and provide incentives for job creation in inner cities. It should ensure that newcomers to our nation and its urban areas will receive the support and opportunities they need to succeed. It should also take into account the particular barriers that face the rural poor with the goal of helping them to achieve long-term economic sufficiency.

Finally, the President should continue to discuss not only the need to avoid scapegoating Arab Americans but the barriers that racial isolation, prejudice, and misunderstanding pose and the ways in which we can surmount these barriers.

He should underline a lesson that we all should have learned in the last century, that neither our great cities nor any other area of the nation will thrive for very long if they continue to contain large groups of people who are afforded neither opportunity nor hope.

4. Promote Public and Private Leadership to Enhance Civility and Acceptance of Differences in Our Society

We recommend that the President, Congress, cabinet officials, and other political leaders undertake major efforts to help promote civility and acceptance of differences in our society. This should include seeking opportunities to speak out against bigotry, intolerance, and prejudice in our society.

As the nation witnessed a series of disturbing attacks against individuals perceived to be Middle Eastern, Arab, or Muslim, in the aftermath of the September 11 terrorist incidents, we were reminded once more of the need to directly confront the prejudice and intolerance that can lead to hate crimes — in our communities, in our houses of worship, in our schools, and, especially, in our homes.

It is hard to overstate the importance of outspoken leadership and funding for federal educational initiatives in opposition to all forms of bigotry. Our civic leaders set the tone for national discourse and have an essential role in shaping attitudes.

Civil Rights Legislation and Policy

5. Education

We recommend that the Administration vigorously enforce federal education and civil rights statutes to ensure that no child is left behind by:

a. Enforcing provisions of Title I of the Elementary and Secondary Education Act designed to close achievement gaps and seeking the resources needed for its success.

The No Child Left Behind Act of 2001, reauthorizing the Elementary and Secondary Education Act, was a centerpiece of the President's domestic agenda. The Act was approved with strong bipartisan support in Congress and contains important measures to direct assistance to high-poverty schools, to improve reading skills in the early elementary grades, and to hold schools and school districts accountable for improving student performance, lowering dropout rates and closing gaps that separate poor and minority children from their more affluent and non-minority peers. While similar measures were approved in 1994 during the Clinton Administration, they were met with resistance in many states and further limited by weak federal enforcement. The current Administration has yet to take up the mantle and demonstrate that it is serious about the President's commitment to closing achievement gaps. The test will come during 2002 and 2003, when the Department of Education is required to make key decisions about enforcement and guidance and the President will submit his education funding proposals to Congress. How the Administration performs on these challenges will signal its true commitment to disadvantaged children and, ultimately, will determine whether the law will be an effective remedy for educational neglect and failure in high-poverty, high-minority communities.

b. Preserving and affirming voluntary diversity and desegregation plans in elementary and secondary education. See chapter 1 and recommendation 2.d.

c. Affirming and promulgating fair testing guidelines.

In December 2000, the Department of Education issued a resource guide on "The Use of Tests as Part of High-Stakes Decision-Making for Students." The guidance tracks both legal requirements under federal laws prohibiting discrimination on the basis of race, gender, disability, and national origin and widely recognized standards on test use that have been developed by experts in educational measurement. The guidance was issued after substantial input from a body of the National Academy of Sciences and with the support of major test publishers, education associations, and civil rights groups.

Early in the Bush Administration, however, the guidance was withdrawn without explanation. To date, there has been no signal that the Administration intends either to follow the guidance in the Education Department's own Office for Civil Rights (OCR) enforcement program or to disseminate it to the education officials who will be making high-stakes decisions (often with a disparate racial impact) about student promotion, placement, retention, and graduation. Particularly as additional tests to measure school progress proliferate under the President's education program, it is important to ensure that tests are not used to visit unfair and impermissible consequences on students.

d. Giving priority to the needs of particularly vulnerable student populations.

Children with disabilities or with limited English proficiency, particularly when also poor and minority, are at tremendous risk of educational failure. Similarly, children who lack a stable residence and who change schools frequently suffer overwhelming educational and psychological harm. The Department of Education (along with other agencies where appropriate) should take steps to ensure such children are fully included in school reform and improvement efforts and are provided with qualified teachers and the educational programs and services they need to succeed.

e. Recommending that Congress reauthorize the Individuals with Disabilities Education Act (IDEA) and make good on its promise to provide adequate federal funding for IDEA-mandated services to students with disabilities. We further recommend that Congress pay careful attention to research documenting the adverse impact of overclassification on minority students.

f. Taking aggressive steps to ensure that all agencies that administer federal education programs enforce Title IX's prohibition against sex discrimination. The Department of Education should take the lead in Title IX enforcement by:

- *Conducting targeted compliance reviews to ensure that female students receive their fair share of athletic opportunities;*
- *Working to eliminate (including through targeted compliance reviews) sex-segregation in career education*

programs, including School-to-Work, vocational education, and computer science and technology education programs; and

- *Ensuring that recipients of federal aid adhere to the Department's guidance on sexual harassment, including providing students and employees with information and procedures to address complaints.*

While Title IX has led to many gains by women and girls in education, female students continue to lag behind males in several significant respects. Girls are significantly underrepresented in high school courses that lead to high-tech careers or to postsecondary opportunities in mathematical and computer sciences. E.g, only 9% of students taking the Advanced Placement computer science exam are girls. Women now make up over half the undergraduate college enrollment, but receive only 41% of athletic scholarship monies and 33% of athletic operating budgets.

g. *Defend civil rights statutes (including Title VI, Title IX, section 504, and the Americans with Disabilities Act) against challenges that would limit their scope in protecting students and employees from discrimination.*

6. Voting

We recommend that reform of voting procedures and full enforcement of the Voting Rights Act of 1965, as amended, be raised to a high priority on national, state and local agendas.

a. *We recommend that Congress enact legislation to ensure that within each state all qualified persons will have equal and effective access to registration and voting. Such legislation should include the following:*

- *A requirement that under the aegis of a federal election entity each state develop standards to ensure ballot access;*
- *A requirement for computerized statewide voter registration that will reduce erroneous purging;*
- *A requirement that eligible voters who are challenged (e.g., for appearing at the wrong precincts) be allowed to vote provisionally so that their ballots will be counted for all offices for which they are eligible to vote;*
- *A requirement that accommodations be made to ensure that polling places and ballots will be accessible to people with disabilities and, through ballot translation, to non-English speakers; and*
- *A requirement that federal funds be made available to the states and used for computerized registration systems, provisional voting, providing access to disabled and non-English speaking citizens, and training election personnel.*

The elections held in 2000 amply demonstrated the need for the reforms recommended above. As to some provisions, Congress has authority to act with respect to all elections under the 14th and 15th Amendments to the Constitution. As to others its authority may be limited to federal elections, where it has broad regulatory authority under Article I, section 4. But since the cost to states of maintaining two electoral systems is very high, the legislation recommended may lead to reform across the board.

While Congress may soon take action on some of the reforms recommended above, the effort should not end there. New efforts should be mounted in Congress to complete the agenda.

b. *The Administration should fully and vigorously enforce the Voting Rights Act and Congress should consider legislation to facilitate private suits under the Act.*

c. *As noted in the following section, action should be taken by both the federal government and the states to restore the franchise to ex-offenders.*

7. Criminal Justice

We recommend that Congress and the states seriously address pervasive bias and disparities in the enforcement of the criminal laws in the areas of sentencing, felony disenfranchisement, profiling (including traffic stops), and juvenile justice.

Since 1989, the Citizens' Commission has issued reports comparable to this volume assessing the nation's progress on a variety of civil rights subjects. In many areas of civil life, progress has been made, particularly when there has been responsive leadership at the federal and state levels. Yet, as we detail in chapter 14 of this report, the massive and pervasive bias in the Administration of criminal justice in the United States is a serious threat to civil rights progress. Thus the Commission is impelled to issue a set of recommendations that, while by no means comprehensive, would begin to redress racial injustice in criminal law enforcement, to hold officials accountable, and to restore public confidence in the system, including in policing agencies. Our specific recommendations are as follows:

a. *Congress should consider legislation to reduce disparities in sentencing.*

Sentencing guidelines are often based on sentencing statutes that are infected by racial distortions. For example, the Controlled Substance Act includes a 100-to-1 ratio between the amount of powder cocaine and the amount of crack cocaine needed to trigger the statutory mandatory penalty, a policy which results in great racial disparities.

b. *Congress and affected states should act to end or severely restrict the practice of transferring juveniles into the adult criminal justice system.*

Many states and the federal government have adopted laws that permit or require juveniles to be tried as adults and transferred into adult prison populations. Because they are overrepresented in the juvenile justice system, minority youth bear the brunt of these laws. Black, Hispanic and Asian American youths are far more likely to be transferred to adult courts, convicted and incarcerated than white youths. Within the federal system, 60% of youths in federal custody are Native American. Because the federal government often has jurisdiction over crimes committed on reservations, Native American youths who engage in minor criminal conduct often receive penalties that are far harsher than those that ordinarily would be imposed by a state court.

c. *Congress and the Administration should encourage the repeal of state felony disenfranchisement laws, and states should act to restore the franchise to ex-offenders.*

State laws disenfranchising convicts are pervasive and contribute to lower voting participation among black and Hispanic adults. As a result, it is estimated that 1.4 million black men are denied the right to vote. In two states — Alabama and Florida — 31% of all black men are permanently disenfranchised. These laws are antithetical to democracy and are not necessary to protect the public, or for deterrence or rehabilitation purposes.

d. Congress and the Administration should support legislation requiring federal and state law enforcement agencies to collect and report data on traffic stops and other activities associated with racial profiling, including INS enforcement and airport security activities.

The practice of racial profiling — the identification of potential criminal suspects on the basis of skin color or accent — is widespread. The collection of data by major racial groups is essential in order to understand the dimensions of the problem and to devise workable solutions.

8. Hate Crimes

We recommend that Congress and the Administration take action to investigate and prevent crimes motivated by bias.

a. Congress should enact the Local Law Enforcement Act.

The legislation should authorize the prosecution of cases in which the bias violence occurs because of the victim's actual or perceived sexual orientation, gender, or disability. Congress and the Administration should provide the resources necessary to develop training materials to successfully implement this expanded authority.

b. We recommend that Congress and the Administration promote improved data collection and analysis on hate crimes.

The Justice Department's Bureau of Justice Statistics has funded a necessary study on the differences in Hate Crimes Statistics Act (HCSA) reporting rates among national law enforcement agencies. The federal government should use its full range of resources to implement policy recommendations from that study and encourage comprehensive participation in the national data collection initiative.

The Justice Department should make participation in the HCSA program a prerequisite for receiving money through either the Office of Community Oriented Policing Services (COPS) or its Office of Justice Programs (OJP). Congress and the Administration should require that new officers hired under the COPS initiative receive training in how to identify, report, and respond to hate violence. Congress and the Administration should make the receipt of OJP technical assistance grants dependent on participation in the HCSA data collection effort.

c. Congress and the Administration should provide funds for a national assessment of juvenile hate violence, its causes, the prevalence of the problem in public schools, the characteristics of the offenders and victims, and successful intervention and diversion strategies.

The problem of bias-motivated gang activity and youth violence has not been effectively studied. Additional efforts are necessary to identify and promote effective programs, including community service and alternative sentencing options.

d. The Departments of Education and Justice and other involved federal agencies should step up their response to prejudice-motivated violence — including gang violence — through educational programs and initiatives developed for elementary *and secondary schools, colleges and universities, and in community settings.*

The American Psychological Association (APA), in a landmark 1993 report, documented the role of prejudice and discrimination in fostering social conflict that can lead to violence. Educational resources are effective tools to alter attitudes and behaviors — which in turn can prevent and reduce acts of hatred and discrimination. The Administration and Congress should support adequate funding for new and existing programs such as Partners Against Hate, an initiative funded by the Justice Department's Office of Juvenile Justice Delinquency Prevention.

9. Protecting the Rights of Immigrants

We recommend as follows:

a. The Immigration and Naturalization Service (INS), in cooperation with community organizations, should invest resources and personnel to remove barriers to naturalization.

Many legal immigrants lack effective access to the naturalization process. Many face language and socio-economic barriers. For example, many do not complete the forms correctly and are turned down. Affirmative steps are needed both to examine government-created barriers and to simplify the process and assist immigrants through it.

b. Congress should repeal provisions of the IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act of 1996) and the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) which require mandatory deportation of legal immigrants for minor offenses.

The 1996 amendments removed judicial discretion to prevent deportation in cases where legal immigrants had received a one-year sentence or more, even if the defendant never served any time. Judges are precluded from considering the defendant's ties to the United States, the extent of rehabilitation, or family hardship. As a result, the deportations mandated under the law have resulted in harsh consequences for many legal immigrants and their families. The legislation also stripped legal immigrants of an array of due process protections.

c. Congress should act to remove barriers to voting faced by citizens with limited English proficiency (see Voting, recommendation 6).

10. Closing the Digital Divide

We recommend that the Administration develop and implement a comprehensive set of policies to close the "digital divide" that has meant unequal access to information technology. These policies should include:

a. Continuing the E-rate program, which supports telecommunications access for schools, libraries, and rural health care centers;

b. Devoting more resources (through the Federal Communications Commission and the Departments of Agriculture, Education, Housing and Urban Development, Interior, and Health and Human Services) to informing low-income consumers, as well as carriers in rural and high-cost areas, of their eligibility for benefits and support under the 1996 Telecommunications Act.

c. Supporting investment in community technology centers in low-income and rural neighborhoods across the country.

d. Conducting studies of "information redlining" to determine the extent to which private telecommunications providers avoid poor or minority communities.

The "digital divide" refers to the disparate access that poor and minority communities have had to a variety of information technologies, from basic telephone service to high-speed Internet access and other advanced services. We urge the Bush Administration to continue the progress made under the Clinton Administration in closing the divide with the aid of federal intervention and assistance.

11. Employment Discrimination

We recommend as follows:

a. Federal agencies, including the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) at the Department of Labor, strategically target litigation and enforcement activities to remedy systemic patterns and practices of discrimination.

We advise strongly against returning to the policies of the 1980s, when investigation and enforcement on a class or systemwide basis were discouraged as Administration policy. While many individual cases have merit, addressing barriers that affect large numbers of employees is a more efficacious use of agency resources and expertise.

b. The EEOC should ensure that it is accessible to members of affected communities and that addressing all forms of discrimination remains a high priority.

The EEOC should continue to investigate claims of sex discrimination (including "glass ceiling" issues), racial and sexual harassment, and national origin discrimination. In addition, widespread age discrimination and exclusion of persons with disabilities from the workplace remain critical issues for the Administration to tackle. Finally, more outreach should be done to ensure that EEOC is an effective resource for the affected communities.

c. As noted in recommendation 2.d, the federal government, including EEOC, OFCCP and the Civil Rights Division of the Justice Department, should continue to use affirmative remedies for problems of discrimination.

d. Congress should pass and the President should sign the Employment Nondiscrimination Act (ENDA) to protect the rights of gays and lesbians to be free from harassment and discrimination in the workplace.

12. Housing

We recommend as follows:

a. The Secretary of Housing and Urban Development (HUD) should move quickly to reaffirm the agency's commitment to fair housing enforcement, to ensure that the Office of Fair Housing and Enforcement (FHEO) is staffed with competent leadership committed to aggressive and effective enforcement of the nation's fair housing laws, and to put in place a team of top investigators and other officials and to develop credible plans and goals that will:

- *Resolve the Department's backlog of fair housing complaints; and*
- *Increase significantly the number of complaints charged, and Secretary-initiated complaints filed, including*

cases involving unfair lending practices.

b. Between now and the end of FY2002, the Department of Justice should increase the number of new pattern and practice cases brought (including cases involving discrimination in lending and insurance).

Since 1999, the Justice Department has received additional attorney positions and the number of case referrals from HUD has declined. The Citizens' Commission believes a reasonable goal would be for the Civil Rights Division to increase by half the number of new pattern and practice cases filed by the end of FY2002.

c. The Department of Justice should continue its successful testing program while expanding its role in addressing discrimination in the areas of lending and insurance.

The Housing Section's testing program has been extraordinarily successful, leading the Department to file 62 cases between 1992 and August 2000. Fifty-nine of these cases were favorably resolved, resulting in $7.4 million in compensatory damages, $1.4 million in civil penalties, and the opening up of housing opportunities to the victims of discrimination and their families. The program should be expanded to focus on realtors that engage in interstate commerce and explore ways to test lending and insurance practices.

d. The federal government should substantially increase the supply of affordable housing. See recommendation 3.

Part Two:

Working Papers

Chapter 3

Federal Judicial Nominations and Confirmations During the Last Two Years of the Clinton Administration

by Elliot M. Mincberg[1]

Introduction

During the last two years of the Clinton Administration (1999–2000), the problems that had surfaced previously during the administration with respect to federal judicial nominations and confirmations became even worse. The delays in affording hearings and votes to nominees, particularly female and minority nominees, continued and increased. In several instances, nominees literally waited more than four years. Only 15 nominees were confirmed to the courts of appeals during this period, less than half the number nominated. For the first time in more than a decade, the full Senate voted to reject a federal judicial nominee, as Republican Senators delivered a party-line vote against an African American state supreme court judge nominated to fill a district court seat. A prominent law professor pointedly asked in a *New York Times* op-ed in August, "Why has the G.O.P. kept blacks off federal courts?"[2]

The political forces that underlie these developments were similarly disturbing. Both inside and outside the Senate, some conservatives strongly pushed a strategy of opposition and delay, in part to save more judicial seats for the President to be elected in November 2000. The Clinton Administration sought to push for votes for its nominees, although some saw those efforts as too little and too late. The administration continued to nominate primarily "centrist" individuals considered easier to confirm, but soon found that virtually any candidate, particularly for the courts of appeals, ran into problems in the Senate. And after the November elections, early actions by the Bush Administration strongly suggested that conflicts and dangers to civil rights would continue to plague the judicial nomination and confirmation process.

This chapter will review the record of the Clinton Administration and the Senate in nominating and confirming judges for the federal bench during 1999–2000. First, it describes the procedures used to select and process candidates, which remained similar to the procedures used since 1995. Second, it analyzes the record of President Clinton in making nominations and the Senate in processing and confirming them, including such factors as quality, experience, diversity, and ideology. Finally, the chapter will include a brief look at the nominations and confirmations process during the first six months of the Bush Administration, and will discuss the outlook for judicial nominations over the next several years, including suggestions for helping promote excellence, diversity, and commitment to equal justice in the federal judiciary.

I. Procedures for Nominating and Processing Federal Judgeship Candidates in 1999–2000

During 1999–2000, the procedures for nominating and then processing nominees for federal judgeships remained essentially the same as since the Republican party assumed control of the Senate in November, 1994. Although the rhetoric and the results altered somewhat, most of the technical procedures used by the President and the Senate did not materially change.

A. Criteria for Selection

The overall criteria utilized by the Clinton Administration for selecting judges remained relatively constant throughout the administration's two terms. President Clinton continued to express his interest in increasing diversity on the federal bench, particularly in light of the extremely low number of women and minorities previously appointed by Presidents Reagan and Bush. He also stated that he sought to appoint as judges "men and women of unquestioned intellect, judicial temperament, broad experience, and a demonstrated concern for, and commitment to, the individual rights protected by our Constitution, including the right to privacy."[3] For a number of years, moreover, an additional criterion appears to have been added: a desire to avoid significant controversy over judgeships. As one administration official candidly admitted, "[w]e've steered clear of a few people who might have been fabulous judges but who would have provoked a fight that we were likely to lose."[4] As 1999–2000 continued, the administration increasingly found that even apparently non-controversial candidates encountered significant problems in securing confirmation.

B. Overall Method of Selection

The general method used by the Clinton Administration to select nominees remained similar throughout its two terms. At the district court level, the administration primarily followed the historical practice of "senatorial courtesy." Under this procedure, the senior Democratic Senator from the state with a judicial vacancy recommended between one and three candidates for the position. Where there have been two Democratic Senators from a state, they have divided up responsibility for suggesting nominees in an agreed-upon fashion. In states represented by both a Democratic and Republican Senator, the two Senators have generally worked out a method in which each plays some role in the selection. Where there was no Democratic Senator, the recommendation was made by the ranking Democrat in the state's House delegation, the Governor, the Representative from the specific area, or another official selected in consultation with the White House, and informal methods have generally been worked out to provide some input from the Republican Senators for such states. The Justice Department and the White House screened candidates, and the President made the final selection.

As during the earlier part of the Clinton Administration and during previous Republican administrations, the White House reserved a larger role in finding and selecting nominees to the federal courts of appeals. A significant role was played by the Office of Counsel at the White House. A variety of sources have provided input, including Senators and other officeholders, and again the President made the final selection after screening took place.

Even more than during the first part of the Clinton Administration, the White House consulted Senate Judiciary Committee chairman Orrin Hatch as well as other Republican Senators prior to submitting nominations. This represented a noticeable change from the practice under the first President Bush, when the Republican Party controlled the Presidency and the Democrats controlled the Senate. Sometimes, the Clinton Administration was criticized for taking the advice of Republican Senators on nominations, as when President Clinton accepted the recommendation of Senator Slade Gorton and nominated Barbara Durham, who later withdrew for health reasons, for a seat on the 9th Circuit court of appeals in 1999.[5]

C. Investigations and Interviews

1. The Justice Department and the White House

Although some of the individual names have changed, the basic procedures for the extensive process of investigating and interviewing candidates for the federal bench did not alter significantly during the last two years of the Clinton Administration. As before, both the Justice Department and the White House played important roles, with the activity at Justice centered in the Office of Policy Development, headed by Assistant Attorney General Eleanor D. Acheson. The focal point for judicial nominations activity at the White House remained in the Office of Counsel, where the leading role was played by Mark Childress and then by Sarah Wilson. As before, the Attorney General, White House Counsel, and other administration officials participated in the process.

2. The American Bar Association

During the last two years of the Clinton Administration, the American Bar Association's Standing Committee on the Federal Judiciary maintained its traditional role of evaluating the qualifications of potential nominees for the federal bench prior to their nomination, continuing a practice with a 50-year bipartisan pedigree of providing input prior to a final decision on nomination. Although Senator Hatch had ended the ABA's formal role at the Senate Judiciary Committee level, its crucial function prior to nomination continued until the early days of the Bush Administration, as discussed below. Most of President Clinton's nominees during this period received the ABA's highest "well qualified" rating; overall, as of 1999, Clinton's appointees received "the highest ABA ratings among the past four Presidents."[6]

3. The Senate Judiciary Committee

The Senate Judiciary Committee plays a key part in the Senate's "advice and consent" function on judicial nominations by investigating, holding hearings, and voting in committee on nominees. Since 1995 and until 2001, the committee was chaired by Republican Senator Orrin Hatch.

The period of 1999–2000 saw an increase in the problems of delay and slowdown in the work of the Senate Judiciary Committee. During the first half of 1999, not a single confirmation hearing was held. Only a total of seven hearings were held in 1999, and only eight in 2000, compared to 11 in 1998.[7] Thirty-seven nominees, almost one-third of the eligible nominees submitted during the period, never received hearings at all, including more than half of the President's nominees to the courts of appeals.[8] This included one nominee, Helene White for the 6th Circuit court of appeals, who literally waited more than four years and received no action whatsoever on her nomination.

A primary reason for these problems was the clear abuse by some Republican Senators of the process of placing "holds" on judicial nominees, particularly the "blue slip" process. The purpose of the "blue slip" policy is to encourage an administration to consult both home state Senators prior to a candidate's nomination, as the Clinton Administration carefully did during its tenure. Under the policy, each home state Senator literally receives a blue slip of paper when a candidate from that state is nominated and that slip is to be returned in order for a nomination to proceed. Despite extensive pre- and post-nomination consultation by the Clinton Administration, however, a number of Republican Senators refused to return their blue slips for extensive periods of time, blocking any action on nominees for years. Although the process was a confidential one during this period, reports indicated, for example, that Senator Spencer Abraham's refusal to return his blue slip was responsible for much of the four years of delay on Helene White's nomination. In an even more troubling move, reports indicated that beginning in 1995, Senator Jesse Helms used his refusal to return blue slips to block hearings or any action for almost five years on African American nominees to the 4th Circuit court of appeals. This was despite the fact that until President Clinton's recess appointment of Roger Gregory of Virginia, who also did not receive a hearing during 2000 after he was nominated, no African American had ever served on the 4th Circuit court of appeals. Although the blue slip process remains an important one, there is little question that it was seriously abused during the latter part of the Clinton Administration.[9]

II. The Record on Judicial Nominations during the Last Two Years of the Clinton Administration

During 1999–2000, President Clinton made 74 nominations to the federal bench that were voted upon by the Senate. Three additional nominees were withdrawn, and 41 nominations were made and not acted upon by the Senate, more than twice the number as during the previous two years.[10] Although progress continued to be made in improving the diversity, quality, and commitment to equal rights of judicial nominees compared to the situation in the Reagan-Bush Administrations, observers reported serious problems concerning judicial nominations during this period.

A. The Overall Record

As the late Judge Leon Higginbotham has written, a diverse federal judiciary is important in order to ensure that all litigants "benefit from the experience of those whose backgrounds reflect the breadth of the American experience, as well as to help ensure that the bench is "both substantively excellent and respected by the general population."[11] In this key area, significant progress clearly was made under President Clinton. Out of some 570 judges nominated in 1981–92 by Presidents Reagan and Bush, less than 4% were African American and less than 8% were minority. In sharp contrast, more than 16% of President Clinton's appointees were African American and more than 24% have been minority, including the first Japanese-American judge nominated for the federal courts of appeals. In fact, the number of African Americans appointed by President Clinton in his eight years in office was greater than the total number appointed during the 23 years of the first Bush, Reagan, Carter, and Ford presidencies put together. During the last two years of his presidency, approximately 27% of Clinton's nominations were minorities.[12]

President Clinton also made significant progress with respect to gender diversity. Overall, just over 29% of his judicial appointments have been women, again representing a larger number than the previous four presidencies. During 1999–2000, just over 31% of President Clinton's federal judicial nominees were women.

In general, the President's nominees have demonstrated high quality, as measured by such factors as prior experience with the judicial system as a judge, prosecutor, or public defender as well as ABA ratings as discussed above. Most have listed at least some *pro bono* or public interest experience, although, as the Alliance for Justice has noted, the use by conservative Senators of some nominees' public service work as a basis for opposing or delaying nominations has clearly been detrimental.[13] Several 1999–2000 nominees have distinguished records of helping provide legal assistance to the disadvantaged. For instance, Judge George Daniels now of the Southern District of New York worked at the Legal Aid Society, served on the board of a program for youth crime prevention, and was awarded the Thurgood Marshall prize for his death penalty-related advocacy work.

Throughout this period, some conservatives inside and outside the Senate continued to attack President Clinton for allegedly nominating "liberal" and "activist" judges. The available facts, however, clearly belie these claims. Academic studies of Clinton's appointees, focusing both on their previous records concerning partisan activism and on their voting behavior after appointment, demonstrate that, as the co-author of several of the studies put it, critics' claims are "a bunch of nonsense." The studies suggest, in fact, that Clinton's appointees have generally been less liberal than those of other Democratic Presidents and most resemble the judicial appointments made by President Gerald Ford.[14] As Professor Herman Schwartz of American University explained, Clinton's appointments "show a surprising indifference to trying to undo the sharp tilt to the right of the Reagan and Bush Administrations' judges . . . His judges have been quite middle of the road, and I wouldn't call them liberals."[15]

B. The Problem of Delay and Inaction and the Impact on Female and Minority Nominees

Overall, the 1999–2000 period was characterized by significant delay and inaction by the Senate on many Clinton nominees. As discussed above, 41 nominations made by the President during this period were never acted upon, more than twice the number as during the previous two years. Specifically, the Senate confirmed only 69% of the President's district court nominees during this period, compared with 84% during 1997–98, and confirmed only about 40% of his court of appeals nominees, a significant drop from the 68% two years earlier.[16] One report estimates that, overall, more than 35% of President Clinton's nominees to the appellate courts were not approved, compared with less than 15% under President Reagan.[17]

Even those Clinton nominees who were confirmed during this period often faced long delays. For example, although it took 77 to 81 days for an appeals court nominee to receive a hearing during the first Bush Administration and Clinton's first term, that figure ballooned to 231 days during 1997–98 and even further to 247 days during 1999–2000.[18] As nominations expert Sheldon Goldman and his colleagues put it, a process that had previously been routine for most nominees was "turned into an obstacle course fueled by partisan and ideological divisions to which only a minority of nominees were immune."[19] Indeed, current White House counsel Alberto Gonzalez recently conceded that the "conduct of the Republican Senators" in delaying nominees for as long as four years "was wrong."[20]

Perhaps even more troubling was the fact that delay and inaction had a particularly significant impact on female and minority nominees. Of the 41 nominees not acted upon by the Senate during this period, 22 (or more than 53%) were women or minorities.[21] Even those female and minority nominees who were ultimately confirmed were delayed much longer than other Clinton nominees. At the district court level, female and minority nominees in 1999–2000 waited on average six weeks longer than white male nominees, taking an average of four months to get a hearing on their nominations. At the appellate court level, female and minority nominees had to wait for an average of more than 9 months for a hearing, nearly two months longer than white male nominees. The total confirmation process took nearly five months longer for female and minority appellate court nominees.[22] One study indicated that overall, minority nominees were more than twice as likely to fail to receive confirmation as white nominees.[23] Goldman and his colleagues concluded, "[e]mpirically, as we have demonstrated, the nominees who did not move or who moved only after great delay during Clinton's tenure in the presidency, were disproportionately nontraditional [i.e., female and minority] judgeship candidates."[24] As President Clinton more graphically put it, a number of his minority nominees were "being held in political jail because they can't get a hearing from this Republican Senate."[25]

An examination of what happened (or failed to happen) to several of the many female and minority nominees who never received a vote on their nominations is illustrative. During 1999–2000, the 4th Circuit court of appeals had 4 to 5 vacancies, out of a total of 15 authorized judgeships. Moreover, there had never been a nonwhite judge on that court in its entire history. Earlier in his administration, President Clinton had made clear his strong desire to integrate the 4th Circuit and nominated James Beaty for the court in 1995, but Beaty never even received a hearing. In 1999, he nominated another African American candidate, James Wynn, but Wynn also never received a hearing, reportedly due to the "blue slip" hold exercised by Senator Jesse Helms, as discussed above. In June 2000, Clinton nominated African American attorney Roger Gregory of Virginia to the court. Despite strong support from both home-state senators, Gregory also never received a hearing on his nomination in 2000. The 4th Circuit was finally integrated on December 27, 2000, when President Clinton gave a recess appointment to Gregory, and Gregory was renominated by President Bush and promptly confirmed by the Democratic-controlled Senate in 2001. Nevertheless, the treatment of African American nominees to the 4th Circuit by the Republican-controlled Senate in 1995–2000 was extremely troubling and produced significant criticism by other government officials, newspapers, and civil rights groups.[26]

Another example is provided by the 6th Circuit court of appeals. As noted above, Clinton nominee Helene White waited more than four years and never received even a hearing on her nomination. In 1999, Clinton also nominated Kathleen McCree Lewis, a respected Michigan attorney who received a "well qualified" rating from the ABA and would have been the first African American woman to sit on the 6th Circuit. Nevertheless, Lewis never received even a hearing on her nomination. As Senator Carl Levin explained, these nominees waited "in vain just for a hearing" despite the fact that "[n]o one has questioned their qualifications for the bench."[27]

Similarly, Enrique Moreno was nominated to the 5th Circuit court of appeals in 1999, but was blocked by his two Republican home-state senators from receiving a hearing, despite the fact that the ABA unanimously gave him its highest rating and that Texas state judges had rated Moreno one of the top three trial attorneys in El Paso. Dolly Gee would have been the first Chinese-American woman to serve as a federal judge, but she never even received a hearing on her 1999 nomination to the federal district court in Los Angeles, despite the support of both her home-state senators. Both home state senators, one Democratic and one Republican, supported the nomination of former Iowa Attorney General Bonnie Campbell to the Eight Circuit court of appeals in 2000, and she did receive a hearing, but she was never voted on by the Senate Judiciary Committee or the full Senate. Far-right groups like the Christian Coalition and the Iowa Right to Life Committee opposed Campbell, who had headed the Justice Department's Office of Violence Against Women.[28]

In fact, activity by far right groups to delay or oppose Clinton nominees appears to have further contributed to the problems of 1999-2000. In 1999, Phyllis Schlafly's Eagle Forum began a "Court Alert" campaign that called for conservatives in the Senate to block all of the President's judicial nominees. Right-wing groups like the Christian Coalition, Free Congress Foundation, and the Family Research Council joined the effort, sometimes opposing individual female and minority nominees like Campbell and sometimes calling for a halt to all confirmations. Such groups stepped up their efforts in 2000, with the Eagle Forum, for example, using email alerts to call on the Senate to confirm "NO MORE CLINTON JUDGES."[29]

The delays and failures to act on the nominations of female and minority lawyers to the federal bench produced widespread condemnation. Congressional Hispanic Caucus chair Lucille Roybal-Allard called the delays to female and minority nominees a "slap in the face." Nearly 200 law professors signed a letter in late 1999 expressing concern about the threat to "both judicial independence and diversity on the federal bench" posed by the conduct of Senate leaders. Criticism came from the National Bar Association, the Congressional Black Caucus, the Leadership Conference on Civil Rights, and the President of the National Association of Women Judges. Senators Barbara Boxer and Dianne Feinstein condemned the delays as "unfair" and "ridiculous." Senator Edward Kennedy concluded that the "Republican stonewalling" was "irresponsible and unacceptable" and a "gross perversion of the confirmation process."[30]

C. Controversies over Specific Clinton Nominees

During 1999-2000, significant controversies arose concerning several of President Clinton's female and minority nominees who did receive votes by the full Senate. Most significant were the controversies concerning the nominations of Ronnie White, Richard Paez, and Marsha Berzon.

1. Ronnie White

Ronnie White was originally nominated by President Clinton to the federal district court in St. Louis in 1997. Judge White was the first African American to sit on the Missouri Supreme Court and was highly recommended at his 1998 confirmation hearing both by Republican Senator Christopher Bond and by Democratic Representative William Clay. According to Clay, then-Missouri Senator John Ashcroft told him that Ashcroft had canvassed the other six members of the state supreme court, all of whom had been appointed by Ashcroft, and "they all spoke very highly of Ronnie White and suggested that he would make an outstanding Federal judge." Ashcroft was present at the hearing and did not contradict Clay's account.[31]

Nevertheless, Judge White did not receive a Senate vote on his nomination for more than two years, reportedly due to a hold placed by Ashcroft on the nomination. An agreement was finally reached to hold a vote on White's nomination in October 1999, as part of an arrangement under which President Clinton agreed to nominate a candidate favored by Senator Orrin Hatch to a federal district court judgeship in Hatch's home state of Utah. Despite the previous support of Judge White by Senator Bond and several other Republican Senators who voted for him in the Judiciary Committee, Ashcroft spearheaded a fight that defeated the White nomination strictly on party lines, with every Republican Senator voting against him on the Senate floor.

Ashcroft's attack on White centered on his claim that White had a "serious bias" against upholding death penalty verdicts, claiming that White was more "liberal" on the death penalty than any other judge on the Missouri Supreme Court. In fact, these claims significantly distorted White's record. White voted to uphold death penalty verdicts in 41 out of 59 capital cases, and in most cases in which he dissented, White voted with state court judges who had been appointed by Ashcroft himself when he served as Governor. Indeed, three judges appointed by Ashcroft had voted to reverse death penalty sentences a greater percentage of the time than had Judge White. The death penalty attack was raised by Ashcroft virtually on the eve of the Senate floor debate, with no opportunity for White to respond, despite the fact that White had already been asked about the death penalty at his hearing and made clear that he has consistently voted to affirm death penalty convictions except in cases of serious constitutional error. Despite Ashcroft's efforts to solicit opposition, moreover, several Missouri law enforcement officials and organizations supported White's confirmation.[32]

The rejection of White's nomination was the first time in more than a decade that the full Senate had turned down a judicial nominee and the first time in nearly 50 years that a district court nomination had been voted down. Condemnation of the action was extremely harsh. *The New York Times* called the vote a "judicial mugging." *The Washington Post* concluded that it showed that "there is no longer even a component of principle in the Senate's judicial confirmation process." Representative Clay and California Representative Maxine Waters characterized the behavior of Ashcroft and Bond as racist. Others suggested that Ashcroft's actions may have been motivated by disagreements with White about abortion or by Ashcroft's concern about his upcoming reelection battle, in which Ashcroft had raised the issue of support for the death penalty and his opponent had raised the issue of the White nomination. Whatever the reasons, even Republicans later expressed regret about the White vote, with some even making the remarkable claim that they had not known that White was an African American at the time. Indeed, Ashcroft's role in the attack on White became a major issue in Ashcroft's own confirmation as Attorney General in 2001. The Congressional Black Caucus concluded that White's rejection "left profound doubts about fair and unbiased treatment of African American nominees" and "cast a racial cloud over the process."[33]

2. Richard Paez and Marsha Berzon

Richard Paez was nominated for the 9th Circuit court of appeals in January 1996, and was finally confirmed more than four years later in March 2000. By then, Judge Paez had more than eighteen years of judicial experience, including as a federal district judge in Los Angeles. His colleagues on the bench, attorneys who appeared before him, his home state Senators, and officials of both parties praised him highly, and he received the ABA's highest "well qualified" rating. He was approved both in 1998 and in 1999 by the Senate Judiciary Committee, receiving votes from both Republicans and Democrats.[34]

Nevertheless, a full Senate vote on his nomination continued to be delayed, as some Senate Republicans charged that he was too liberal. Some claimed that he was "soft on crime," despite the fact that he had never been reversed on criminal sentencing and that a Justice Department analysis showed that he was more stringent than most other judges on criminal matters. Some asserted that he had violated the Judicial Code of Conduct by raising concerns about anti-civil rights ballot propositions in California, but Judiciary chair Orrin Hatch himself made clear that this charge was erroneous. Extensive advocacy and negotiations involving the White House and the Senate became necessary to secure a Senate vote on Paez, including discussions and a purported deal around the time of the Ronnie White vote, serious and sustained criticism by Democratic Senators and by Hispanic and other civil rights groups, and finally an agreement between Senator Barbara Boxer and Senate Majority Leader Lott in 2000 to "trade" a vote on Paez for a vote on a friend of Lott who had been nominated to the Tennessee Valley Authority board. Even after all this, several right-wing Senators made final efforts to prevent a vote, and Senator Bob Smith of New Hampshire began a filibuster against Paez. The filibuster was defeated, however, and Paez was approved by a vote of 59 to 39.[35]

The story concerning the nomination of Marsha Berzon, who waited more than two years for a vote on her nomination to the 9th Circuit court of appeals, was similar. A nationally renowned California appellate lawyer who specialized in labor matters, she was supported by both her home state Senators, Judiciary chair Orrin Hatch, a former key aide to President Ronald Reagan, and many corporate lawyers who had opposed her in labor cases. As with Paez, the only significant opposition came from far right groups and Senators. Nevertheless, several Republican Senators were able to prevent a full Senate vote on the nomination, necessitating an effort closely paralleling what happened with the Paez nomination. As with Paez, Senator Robert Smith tried to filibuster a vote, but that attempt failed, and Berzon was confirmed on the same day as Paez by a vote of 64 to 34.[36]

III. The First Six Months of the Bush Administration and the Outlook for the Future

The controversy over judicial nominations did not end with the 2000 election. During the election itself, judicial nominations became an issue; it was raised against now former Senators John Ashcroft and Spencer Abraham, who were charged with delaying and opposing female and minority nominees. It also became an issue discussed during the Presidential election, particularly because of concerns about then-candidate Bush's statements that he would seek to appoint more justices like Antonin Scalia and Clarence Thomas to the Supreme Court.[37]

In early 2001, President Clinton renominated nine individuals whose nominations had lapsed because of the often long delays in their processing, including six minority and female nominees: James Wynn, Roger Gregory, Enrique Moreno, Helene White, Kathleen McCree Lewis, and Bonnie Campbell. Support of these nominees by President Bush, and confirmation by the Senate, could have been a significant step toward progress and bipartisanship on judicial nominations.

Unfortunately, this did not occur. To the contrary, President Bush's first public action with respect to judicial nominations in March 2001 was to withdraw President Clinton's nominees and to end the role of the ABA for some 50 years in screening potential nominees prior to their nomination. These moves provoked objections from Senate Democrats and many others. In addition, reports indicated that little or no genuine consultation with Democratic Senators occurred on potential nominees. At the same time, reports that the right-wing Federalist Society was directly recommending nominees, coupled with the appointment of a number of lawyers with Federalist Society and other right-wing credentials to key positions in the Justice Department and the White House counsel's office, fueled concerns that Bush would nominate far right candidates with troubling views on civil rights and civil liberties.[38]

President Bush announced his first set of nominations on May 9, 2001, nominating 11 individuals to appellate court seats, a number of which had been the subject of significant delays under President Clinton. On a positive note, Bush renominated Roger Gregory to the 4th Circuit court of appeals, and also nominated African American Barrington Parker, Jr., a Clinton district court appointee, to the 2nd Circuit. On the other hand, a number of Bush's initial picks, as well as several made later, have come under fire as extreme conservatives with troubling records on civil rights and civil liberties. For example:

Jeffrey Sutton, nominated to the 6th Circuit court of appeals, has been criticized for extensive efforts as an appellate lawyer to curtail congressional authority and limit federal protections against discrimination and injury based on disability, age, race, religion, and sex. As of July 3, 2001, more than 50 national groups and over 220 regional, state, and local organizations have opposed his confirmation, including the National Rehabilitation Association, the American Association of Persons with Disabilities, the Welfare Law Center, and the National Women's Political Caucus. As the *The Wall Street Journal* reported, Sutton was described even by one of his supporters as the "perfect kind of poster child for what Democrats see as prototypical George W. Bush judges."[39]

Michael McConnell, a University of Utah law professor nominated to the 10th Circuit court of appeals, has generated significant criticism, focusing on his views on reproductive choice, privacy, and church-state separation. For example, McConnell has called the Supreme Court ruling in *Roe v. Wade* "illegitimate" and "an embarrassment," and signed a 1996 "pro-life" statement that asserted that abortion "kills 1.5 million innocent human beings in America every year" and called for a constitutional amendment to ban abortion.[40] He has also advocated a "radical" departure from decades of First Amendment decisions by the Supreme Court, such as rulings forbidding government-sponsored prayer at public school graduations.[41]

Carolyn Kuhl, a state superior court judge nominated in June 2001 to the 9th Circuit court of appeals, has been severely criticized for her record on civil rights, privacy, and reproductive rights. For example, while in the Reagan Justice Department, she reportedly played a key role in convincing the Attorney General to reverse prior policy and support a policy that would have granted tax-exempt status to Bob Jones University despite its racially discriminatory practices, an approach rejected by the Supreme Court by an 8 to 1 vote. She also urged the Supreme Court to overturn its *Roe v. Wade* ruling as "flawed."[42]

Senate reaction to these nominations has been mixed. Republicans have generally been very positive, switching their views of only several months previously and urging that all the nominees be voted on swiftly with little deliberation. Although Senate Republicans had reportedly been preparing to do just that, the decision by Senator James Jeffords to become an independent and vote with Democrats to organize the Senate, prompted in part by concern about judicial nominations, changed the picture considerably. As of September 1, 2001, the Democratic-controlled Senate had already held hearings on and confirmed several nominees as to whom there was genuine bipartisan consultation and support, including Roger Gregory and several others. As many Senators have made clear, however, careful scrutiny of Bush's nominees will occur. Even White House counsel Alberto Gonzalez predicted that as few as five of Bush's nominees would be confirmed by the end of 2001, in part because of the poisoned relations produced by Senate Republican treatment of Clinton nominees over the last several years and in part because of the concern that President Bush is seeking to "stack the federal judiciary with conservatives."[43]

In fact, that concern poses a significant danger to civil and constitutional rights. In large measure because of the delays and failures to vote on Clinton nominees, there are now more than 90 vacancies on the federal courts, many on the influential courts of appeals. Projections indicate that if all anticipated vacancies over the next four years are filled by Bush nominees, the majority of judges on each one of the nation's circuit courts of appeals will be made up of Republican-appointed judges. Although past Republican Presidents have sometimes appointed moderate judges, the risk is clear if President Bush does not. When the prospect of vacancies on the closely divided Supreme Court is also considered, the danger is even more evident. As a report by People For the American Way Foundation concluded last year, the appointment of just one or two more justices like Scalia and Thomas could "reverse decades of Supreme Court precedents in civil rights" and many other areas, "curtailing or abolishing fundamental rights that millions of Americans take for granted."[44] Far right groups recognize the stakes as well, calling the federal judiciary "the top prize" in last year's election, and pushing the administration and Senate allies to appoint judges and justices that will "tip the judicial balance decisively."[45]

The prospects for the future, therefore, are clearly troubling. President Bush should be urged to restore the pre-nomination role of the ABA and to seek out moderate, diverse nominees with a demonstrated understanding of and commitment to civil and constitutional rights. In that regard, he should genuinely consult with Democratic as well as Republican Senators prior to nomination. This should include, as President Clinton did, listening to and following advice on nominating specific suggested candidates, particularly some of the nominees treated so unfairly during the latter part of the Clinton Administration.

For its part, the Senate should insist on such action by the President. It should carefully and thoroughly review the President's nominees, particularly for the courts of appeals and the Supreme Court, looking for key characteristics like demonstrated commitment to civil and constitutional rights, as more than 200 law professors have recently suggested.[46] Nominees that reflect genuine bipartisan consideration and moderation should receive priority in processing. And the Senate should not hesitate to fulfill its constitutional responsibility of rejecting and withholding its consent from those that do not. A recent poll indicates, for example, that a clear majority of the American people believe that Senators should ask judicial nominees about their views on such subjects as civil rights and affirmative action, and should vote not to confirm nominees "if the Senator thinks the nominees' views on important issues are wrong."[47] As *The New York Times* explained, while the President clearly has the power to nominate judges, Senators should not "move aside passively for confirmation of ideological jurists" who would seriously weaken civil rights and other protections and whose appointment could "distort the balance of the federal judiciary for decades to come."[48]

Endnotes

[1] Vice President, General Counsel, and Legal and Education Policy Director, People For the American Way Foundation.

[2] C. Ogletree, "Why Has the G.O.P. Kept Blacks off Federal Courts," *The New York Times*, Aug. 18, 2000.

[3] *See ABA Journal* at 57 (Oct. 1992).

[4] *See* Gest, "Disorder in the Courts?" *U.S. News & World Report*, at 40 (Feb. 12, 1996) (quoting Assistant Attorney General Eleanor Dean Acheson).

[5] *See* People For the American Way Foundation (PFAWF), *The Senate, the Courts and the Blue Slip*, at 2 (2001) ("*Blue Slip*").

[6] S. Goldman and E. Slotnick, "Picking Judges Under Fire: Clinton's Second Term Judiciary," 82 *Judicature* 282 (1999) ("Picking Judges").

[7] *See* PFAWF, *Status Chart on Judicial Nominees* (Dec. 7, 2000); Alliance for Justice, *Judicial Selection Project Annual Report 1999*, at 5 (Feb. 22, 2000) ("1999 Alliance Report").

[8] *Id.*

[9] *See Blue Slip* at 2-3.

[10] *See* Alliance for Justice, *Judicial Selection Project Annual Report 2000*, at 5 (Mar. 7, 2001); E. Mincberg and T. Hahn-Burkett, "Judicial Nominations and Confirmations During the First Half of the Second Clinton Administration," *The Test of Our Progress*, at 61 (Citizens Commission on Civil Rights 1999). (Note: Although the number provided in the Alliance report is 42, the actual number is 41 since one of the nominees listed in the report, Barbara Durham, was actually withdrawn.) ("2000 Alliance Report").

[11] L. Higginbotham, "The Case of the Missing Black Judges," *The New York Times*, July 29, 1992, at A21.

[12] These and similar numbers in this chapter were derived from White House reports on judicial nominations dated Oct. 3, 1996 and Oct. 8, 1994, the PFAWF status chart, and the 1995, 1999, and 2000 Alliance reports.

[13] *See* 2000 Alliance Report at 10-11.

[14] *See* Picking Judges; S. Goldman and E. Slotnick, "Clinton's Judges," 84 *Judicature* 228, 245, 254 (2001) ("Clinton's Judges"); R. Carp, K. Manning, and R. Stidham, "President Clinton's District Judges," 84 *Judicature* 282 (2001); S. Haire, M. Humphries, and D. Songer, "The Voting Behavior of Clinton's Court of Appeals Appointees," 84 *Judicature* 274 (2001); R. Carp, D. Songer, and R. Stidham, "The Voting Behavior of President Clinton's Judicial Appointees," 80 *Judicature* 16 (1996). The quotation in text is from Professor Ronald Carp, the co-author of two of these articles, in T. Mauro, "Experts Warn that Ranking Jurists Is Risky," *USA Today*, May 7,

1996, at 1A.

[15] *See* J. Biskupic, "Hill Republicans Target 'Judicial Activism,'" *The Washington Post*, Sep. 14, 1997, at A1.

[16] *See* Clinton's Judges at 231.

[17] *See* E. Palmer, "For Bush's Judicial Nominees, A Tough Tribunal Awaits," 59 *Congressional Quarterly Weekly Report* 898, 900 (2001) ("CQ Report").

[18] Clinton's Judges at 235.

[19] *Id.* at 231.

[20] *See* "White House Gloomy over Judiciary Prospects," *CNN.com-allpolitics.com* (Aug. 14, 2001) (quoting White House Counsel Alberto Gonzales) ("Gonzales").

[21] *See* 2000 Alliance Report at Appendix B.

[22] *See* Clinton's Judges at 234-235.

[23] *See* J. Biskupic, "Politics Snares Court Hopes of Minorities and Women," *USA Today*, Aug. 22, 2000, at A1 (quoting study by Citizens for Independent Courts).

[24] Clinton's Judges at 238.

[25] *See* N. Lewis, "President Criticizes G.O.P. for Delaying Judicial Votes," *The New York Times*, July 31, 2000. *See also, e.g.*, C. Ogletree, "Why Has the G.O.P. Kept Blacks off Federal Courts," *The New York Times*, Aug. 18, 2000.

[26] *See, e.g.*, 2000 Alliance Report at 18-19; 1999 Alliance Report at 19.

[27] *Congressional Record* S96661-62 (daily ed. Oct. 2, 2000) (statement of Senator Carl Levin).

[28] *See* 2000 Alliance Report at 21-26.

[29] *See* PFAWF, *Ordering the Courts: Right-Wing Attacks on Judicial Independence in 2000*, at 12-14 (Apr. 2001) ("*Ordering the Courts*").

[30] *See* 1999 Alliance Report at 22.

[31] *See* PFAW, *The Case Against the Confirmation of John Ashcroft as Attorney General of the United States—Part One*, at 6 (Jan. 4, 2001) (quoting Senate Judiciary Committee hearing transcript) ("Ashcroft Report").

[32] *See* Ashcroft Report at 7-9; 1999 Alliance Report at 26-29.

[33] *See* 1999 Alliance Report at 27-29; Ashcroft Report at 8-9; Clinton's Judges at 239-41.

[34] *See* 1999 Alliance Report at 23-24; 2000 Alliance Report at 14-16.

[35] *Id.*

[36] *Id. See also Ordering the Courts* at 12-13.

[37] *See* F. Barnes, "Bush Loves Scalia," *Weekly Standard*, at 16 (July 5/July 12, 1999); *Christian Science Monitor* at 13 (Feb. 1, 2000). For examples of the discussion of the judicial nominations issue in Michigan during Senator Abraham's reelection campaign, *see* "A Political Travesty," *Detroit Jewish News* (June 16, 2000); "Is the G.O.P. Playing Politics with Judicial Appointments," *Michigan Press* (June 25, 2000).

[38] *See Blue Slip* at 3-4; *Ordering the Courts* at 14-15; CQ Report at 898-99; N. Lewis, "Bush to Reveal First Judicial Choices Soon," *The New York Times*, Apr. 24, 2001.

[39] R. Greenberger, "As Hearings on Judicial Nominees Begin, Senate Panel Reserves Fireworks for Fall," *The Wall Street Journal*, July 11, 2001. For the list of organizations opposing Sutton, see <*www.ncil.org/sutton.htm*>.

[40] M. McConnell, "Roe v. Wade at 25: Still Illegitimate," *The Wall Street Journal*, Jan. 22, 1998, at A18; W. Glaberson, "In New Senate, New Scrutiny of Judicial Nominees," *The New York Times*, May 30, 2001, at A18; "The America We Seek: A Statement of Pro-Life Principle and Concern," *First Things*, May 1996, at 1.

[41] *See* "Bush Wants to Place Anti-Separationist Law Professor on Federal Court," *Church*

and State, at 15 (June 2001).

[42] *See* National Abortion Rights Action League, "Judge Carolyn Kuhl Fact Sheet," available at *<www.naral.org/media resources/fact/kuhl_facts.html>*.

[43] Gonzales. *See also* "Judges and Politics," *Congressional Quarterly Researcher*, at 577-600 (July 27, 2001). In fact, 27 Bush nominees were confirmed in 2001 despite these problems and the serious disruption in the Senate and the country, the same number as were confirmed in the first year of the Clinton Administration in 1993. *See Legal Times* at 31 (Dec. 24, 2001).

[44] PFAWF, *Courting Disaster*, at 3 (May 2000). *See also Ordering the Courts* at 15-16; E. Fraser, "Tilting the Bench Farther to the Right," *National Journal* 1518-20 (2001); "Long-Term Impact of President Bush's Appointments to the Federal Bench" (2001) (unpublished analysis available from PFAWF); "Bush's Nominees Should Worry Civil Rights Defenders," *Detroit Free Press*, May 11, 2001.

[45] *Ordering the Courts* at 15 (quoting materials from Courting Justice campaign by Free Congress Foundation).

[46] "Dear Senator" letter signed by over 200 law professors (July 13, 2001) (available from PFAWF).

[47] Hickman-Brown Public Opinion Research, *Current Public Opinion on Judicial Confirmation*, at 1, 2 (July 23, 2001).

[48] "Blocking Judicial Ideologues," *The New York Times*, Apr. 27, 2001.

Chapter 4

Recent Supreme Court Decisions Affecting Congress' Ability to Redress Employment Discrimination[1]

by Michael H. Gottesman[2]

University of Alabama-Birmingham v. Garrett[3] is the latest in a series of decisions in which a five-person majority on the present Court has struck down, one after another, a number of congressional statutes attempting to protect citizens against wrongdoing by state officials. In the past six years, the Court, in most instances by a 5 to 4 vote, has declared nearly 30 federal statutes to be unconstitutional in whole or in part, a rate of roughly five per year. By contrast, in the entire 200-year history of the nation before that, the Court had struck down only 129 statutes, an average of one statute every two years.[4]

This article focuses on just two of the doctrines the Court has used to achieve these results — an expanded reading of the immunity accorded states by the 11th Amendment, and a contracted reading of the powers conferred on Congress by the 14th Amendment. It is these two doctrines that led the Court to invalidate the private damage suit provisions of the Age Discrimination in Employment Act and the Americans with Disabilities Act (ADA), as well as of other statutes. These decisions are not manifestations of traditional divides between liberals and conservatives, or Democrats and Republicans. Rather, these decisions — which represent a degree of judicial activism that is unprecedented, and abandon traditional understandings of the meaning of our Constitution articulated in prior Supreme Court decisions — position the Court's present majority outside the mainstream of contemporary American thought about the relationship between federal and state governments.

This is a harsh assessment. But just two recent examples show that it is accurate. In the *Garrett* case, the Court struck down a provision of the ADA that was approved in the Senate by a vote of 91 to 6, and in the House by a vote of 377 to 28. This provision was signed into law by President George H. W. Bush, who declared it one of the landmark civil rights laws in our country's history, one that would bring us "closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty and the pursuit of happiness."

Title I of the ADA imposed duties upon states (as well as on all other employers in America) to stop discriminating against persons with disabilities, and authorized private-party lawsuits as a means to enforce those duties. Although this legislation subjected States to damages actions by employees claiming disability discrimination, the states did not oppose any part of the ADA. Quite the contrary, the bill that became the ADA was vigorously supported by the National Association of Attorneys General and other national organizations of state officials.

The *Garrett* case came to the Court a decade after the ADA's passage, but nothing had happened in the interim to diminish the broad enthusiasm for the statute, including for its provisions regulating the states and authorizing private suits to enforce and for damages. Former President Bush filed an amicus brief in the Supreme Court urging the Court to uphold the challenged provision of the ADA.[5] Similarly, those in both parties who had championed the ADA at the time of its enactment filed an amicus brief urging that the Court uphold the provision.[6]

Nor had there been any broad defection by states in the decade since the ADA's passage. Although states were now finding themselves defendants in numerous private suits seeking damages for violating the ADA, and although Alabama urged all the states to join in an amicus brief supporting its effort to invalidate the ADA's authorization of private-party suits, only seven states answered Alabama's call. Remarkably, twice as many states responded by filing an amicus brief urging the Court to *uphold* the provision that subjected them to these suits. This brief advised the Court that the problems of disability discrimination by individual state actors remained real, that state laws were inadequate to solve the problem, and that states were willing to suffer these damage suits in order to assure that the public interest in ending discrimination against persons with disabilities is vindicated.

Other recent decisions in which the Court's five person majority has struck down federal legislation have similarly lacked any significant constituency within our nation. For example, in *Morrison v. United States*, the Court struck down an important provision of the Violence Against Women Act, which had been enacted by Congress with the votes of huge majorities in both parties. That triumph for "state's rights" was achieved although 37 states had joined in an amicus brief urging the Court to *uphold* the provision, and only one state had filed a brief urging the result the Court reached. A similar story can be told about other congressional statutes that have been declared unconstitutional as applied to the states, among them the Age Discrimination in Employment Act, the Religious Freedom Restoration Act, and the Patent Remedy Act.

The five-person majority on the Court has achieved these results by ignoring well-established Supreme Court precedents; by ignoring (as it admits) the plain language of the Constitution in favor of a vision of the states as "equal sovereigns" (a vision that ignores the Constitution's Supremacy Clause); and by discarding the tradition of deference to the fact-finding and policy judgments of Congress, a deference that previously had been a hallmark of the Court's approach to assessing the constitutionality of federal statutes.

This article will briefly describe the two 180-degree turns in the Court's jurisprudence that led to the invalidation of the ADA's private-suit provision in *Garrett*.

I. The 11th Amendment

The 11th Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States *by Citizens of another State, or by Citizens or Subjects of any Foreign State*" (emphasis added).[7] As is evident from its wording, the 11th Amendment does not purport to deprive the federal courts of jurisdiction to entertain suits against states *brought by their own citizens*. This is not an accident. It reflects the limited purpose the 11th Amendment was adopted to serve.

The 11th Amendment was added to the Constitution to overturn one of the Supreme Court's earliest decisions, *Chisholm v. Georgia* (1793).[8] *Chisholm* held that the "diversity of citizenship" clause in Article

III of the Constitution conferred jurisdiction on federal courts to adjudicate claims brought by non-citizens alleging that a state had violated *state law.* Justice Iredell, who dissented in *Chisholm,* argued that this was error — that the diversity of citizenship clause should not be construed to deprive states of their traditional immunity when sued *under state law.* But even Justice Iredell conceded that the federal courts had jurisdiction over suits against states seeking to enforce *federal law;* that followed logically from the fact that the Constitution contained a Supremacy Clause declaring federal law to be supreme and binding on the states.

The 11th Amendment was designed to incorporate into the Constitution the vision expressed in *Chisholm* by Justice Iredell. That is why it is worded as it is. True to the literal language and the clear purpose of the 11th Amendment, the Supreme Court had held, prior to enactment of the ADA, that the 11th Amendment is no bar to Congress' creating private causes of action against states to enforce the obligations imposed upon states *by federal statutes.*[9] But six years after enactment of the ADA, the new five-person majority on the Court overruled *Union Gas,* in *Seminole Tribe v. Florida* (1996),[10] and held that, except for statutes enacted by Congress in the exercise of its power to enforce the 14th Amendment, the 11th Amendment denied Congress any power to create private causes of action against states.

The *Seminole Tribe* majority conceded that its ruling was contrary to the language of the 11th Amendment. As it acknowledged, "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts."[11] Nonetheless, the Court ruled that the Amendment also restricted the *federal question* jurisdiction of the federal courts, because "[i]t is inherent in the nature of [state] sovereignty not to be amenable to the suit of an individual without [the state's] consent."[12] The Court made no effort to square this reasoning with the Constitution's Supremacy Clause, which clearly declares that states are not "sovereign" when Congress has enacted a federal law.

Just how far from the mainstream the Court's *Seminole Tribe* decision wanders can be discerned from the reaction of Justice John Paul Stevens — who was appointed to the Court by President Gerald Ford, and who is not by nature given to hyperbolic diatribes. Traditionally, Justices who dissent from a decision (as Justice Stevens had in *Seminole Tribe*), nonetheless will accept it as controlling precedent, and apply it in future cases despite their misgivings. When the challenge to the Age Discrimination in Employment Act was before the Court in *Kimel,* Justice Stevens explained why he could not follow that traditional course:

> *I remain convinced that* Union Gas *was correctly decided and that the decision of five Justices in* Seminole Tribe *to overrule that case was profoundly misguided. Despite my respect for* stare decisis*, I am unwilling to accept* Seminole Tribe *as controlling precedent . . . [B]y its own repeated overruling of earlier precedent, the majority has itself discounted the importance of* stare decisis *in this area of the law. The kind of judicial activism manifested in cases like* Seminole Tribe *. . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.*

Justice Stevens' assessment is shared by the virtually unanimous scholarly literature tracing the history of the 11th Amendment and its limited purpose.

II. The 14th Amendment

As noted above, the *Seminole Tribe* majority allowed an exception for statutes enacted by Congress pursuant to its power to enforce the 14th Amendment. Congress could create private causes of action to enforce the 14th Amendment because the 14th Amendment was enacted long after the 11th, and expressly empowered Congress to enact statutes enforcing it.

But in recent decisions that same five-person majority has dramatically narrowed the understanding of what Congress' 14th Amendment power encompasses. It has achieved that narrowing by two devices working in tandem.

A. Decreased Protection Against Discrimination

First, the five-person majority has reconstrued the 14th Amendment substantively, so that it affords less protection against discrimination than previous Court decisions had provided. This narrowing process reached its climax (so far, at least) in *Garrett*, where the Court declared that actions taken by states that intentionally discriminate against persons with disabilities, and that are motivated solely by prejudice and aversion toward such persons, are not violations of the Equal Protection Clause, so long as some "rational" basis for taking that action can be imagined, and even though it is clear that the action was not motivated by that "rational" consideration but instead by irrational animus. The Court declared in *Garrett* that a classification disqualifying persons with disabilities is constitutional unless the challenging party can carry the burden of "negative[ing] any reasonably *conceivable* state of facts that *could* provide a rational basis for the classification."[13] That an action was taken solely out of animus toward persons with disabilities "does not a constitutional violation make."As the four dissenters explained, prior Supreme Court decisions (including a decision finding a denial of equal protection against persons with disabilities) had held that the Equal Protection Clause invalidates "discrimination that rests solely upon 'negative attitude[s],' 'fea[r],' . . . or 'irrational prejudice,'"[citing prior cases].

B. Congressional Authority

Second, the five-person majority has abandoned entirely the deference to congressional fact-finding, and to the congressional determination of what steps are necessary to vindicate 14th Amendment rights, and has imposed its own judgments about these matters in substitution for those of our elected representatives. This has been clear in several recent decisions, but nowhere more dramatically than in *Garrett*, where the Court dismissed out of hand Congress' express findings of rampant discrimination against persons with disabilities, and mocked the massive evidentiary record Congress had compiled in arriving at those findings. As the dissenters noted, the majority had "review[ed] the congressional record as if it were an administrative agency record." This is in stark contrast to the Court's traditional approach.

III. Conclusion

The two doctrinal issues described in this article are only a part of a larger arsenal with which the Court's present majority is eviscerating, in the name of "states' rights," Congress' ability to legislate. These five Justices have also narrowed the traditional understanding of Congress' powers under the Commerce Clause, and have invented an entirely new doctrine that prevents Congress from imposing any affirmative obligations on states. On these issues, as on the ones I have discussed, the agenda of the Court's majority lacks any significant constituency in our nation. Neither party in Congress holds the views (or seeks the ends) espoused in these decisions. And the states have shown no interest in enjoying the newfound "rights" that the Court's majority is so eager to bestow upon them.

The Court's recent decisions in these cases imperil numerous other federal statutes enacted with bipartisan majorities, many of them aimed at preventing employment discrimination. For example, the logic of the five-person majority, and the rigor with which it has shown itself willing to enforce that logic, place in jeopardy the disparate impact provisions of Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, Title II of the ADA, the Fair Housing Act, and many other civil rights statutes. Cases are pending on certiorari today that may provide the Court the opportunity to apply its new jurisprudence to many of these statutes.

Endnotes

[1] This article is adapted from the statement of Michael H. Gottesman before the Senate Committee on Health, Education, Labor and Pensions, concerning recent Supreme Court decisions affecting Congress' ability to redress employment discrimination, on Apr. 4, 2001.

[2] Mr. Gottesman is a professor of law at Georgetown University Law Center. Much of his scholarship focuses on issues of constitutional law, especially the Constitution's allocation of power between the federal government and the states. He represented the plaintiffs, Patricia Garrett and Milton Ash, in *University of Alabama-Birmingham v. Garrett*, decided Feb. 21, 2001.

[3] *University of Alabama-Birmingham v. Garrett*, 531 U.S.C. § ___ (Feb. 21, 2001) ("*Garrett*").

[4] The data appears in Seth Waxman, "Defending Congress," 79 *North Carolina Law Review* 101 (2001).

[5] To my knowledge, this is the first time in our nation's history that an ex-President felt so strongly about a bill he had signed as to file a brief in the Supreme Court defending it.

[6] This brief was filed by, among others, Senators Dole, Hatch, Jeffords, Kennedy and Harkin.

[7] U.S. Constitution amendment XI.

[8] 2 U.S.C. § 419 (1793).

[9] *Pennsylvania v. Union Gas Co.*, 491 U.S.C. § 1 (1989).

[10] 517 U.S.C. § 44 (1996).

[11] *Id.* at 54.

[12] *Id.*

[13] *Garrett.*

Chapter 5

The New Legal Attack on Educational Diversity in America's Elementary and Secondary Schools

by John Charles Boger

Introduction

During the past 50 years, school boards throughout the nation have struggled with varying degrees of earnestness and success to dismantle public school systems once segregated by law or practice. Impelled by the Supreme Court's seminal decision in *Brown v. Board of Education*,[1] later by other key federal judicial decisions, and eventually by their own growing appreciation of the many values of educational diversity, thousands of public school officials have made considerable progress, especially in those school districts where the school-age population remains racially diverse.

Several lower federal courts, however, have recently accepted a novel argument that the well-intentioned practice of assigning students to assure racial and ethnic diversity is itself unconstitutional (except when it is a direct response to a court order to eliminate illegal segregation). Other federal courts are presently facing similar legal challenges. Under the logic of these new attacks, since *all* government actions must be "colorblind" (except in narrowly defined remedial contexts), voluntary efforts by school boards to assure that students will learn together in racially diverse classrooms are forbidden by the Equal Protection Clause.

This remarkable extension of "colorblind" jurisprudence to the elementary and secondary school context is justified neither by the Supreme Court's prior jurisprudence nor by this multiethnic nation's pressing educational and social needs. The conservative advocates who advance this position purport to rely upon a body of affirmative action cases in the contracting and higher education context, none of which presumes to address, or place limits on, public school assignment policies. To be sure, in those cases — principally disputes among rival claimants for scarce governmental resources such as construction contracts,[2] public employment,[3] admission to competitive graduate and professional schools,[4] or redistricting of state and federal voting districts[5] — the Supreme Court has counseled judicial "skepticism" of all governmental classifications by race and has obligated federal courts to undertake a "strict judicial scrutiny" of all governmental decisions that rely, even in part, upon racial or ethnic considerations.[6]

Although such "strict scrutiny" often works to invalidate governmental decisions when scarce benefits or competitive awards depend upon race or ethnicity alone, the Supreme Court has repeatedly emphasized that the 14th Amendment *does not* forbid state and federal decision makers from racial or ethnic considerations in every context. As Justice O'Connor explained in 1995:

> *[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in*

> *fact." . . . The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.*[7]

The recent challenges that attack elementary and secondary school assignments appear deaf to these cautions. Even more remarkably, they have overlooked a *30-year body of Supreme Court cases that acknowledge the constitutionality of race-conscious public school assignments*, including a unanimous Supreme Court decision rendered in 1971[8] and a variety of opinions by at least six subsequent Justices. It is this substantial body of constitutional authority that, with ample justification, has been relied upon by school officials throughout the nation for the past two generations.

If this new challenge were simply a technical dispute among scholars over the history of some narrow constitutional phrase, it could be appropriately relegated to law school libraries or obscure journals. Yet the campaign threatens immediate, real-world harm to millions of American school children. Belying its surface gesture toward "racial fairness," it could eventually overrule the good-faith educational judgments of hundreds of school boards and lead to the resegregation of literally thousands of the nation's schools, exacerbating the present socio-economic isolation of millions of lower income American schoolchildren.[9]

The growing success of this new legal campaign constitutes a disturbing and reactionary chapter in the long history of America's judicial involvement in issues of race and social justice. Policymakers and judges who would forbid school boards from considering race in making school assignments cannot plausibly claim to be unaware of the inevitable social consequences of these unorthodox decisions. Neither can they accurately claim that Supreme Court precedent dictates such actions. Instead, they must take full responsibility for abandoning, on ideological grounds alone, what have long been, with all their difficulties and disappointments, the most effective means for knitting together our increasingly heterogeneous society — racially and ethnically diverse public schools.[10] This misguided effort to extend "colorblind" policy to the elementary and secondary school context should be vigorously opposed and defeated. The Justice Department which, during the Clinton Administration, supported school authorities in defending thoughtful diversity policies, should continue to do so.

I. The Nature and Extent of the New Attack

The new challenge has come in nearly half a dozen recent federal lawsuits filed by parties who contend that school boards may not consider race or ethnicity when assigning children to schools. These parties recently won two key victories in the conservative U.S. Court of Appeals for the 4th Circuit — *Tuttle v. Arlington County School Board*[11] and *Eisenberg v. Montgomery County Public Schools*.[12] Relying on a different ground, a federal district court within the 4th Circuit has also accepted the "colorblind" argument in the long-running Charlotte/Mecklenburg school desegregation case.[13] This essay will carefully examine each of these three decisions, since they exemplify the dubious legal rationales on which the broader legal assault has relied.

These three 4th Circuit opinions do not stand alone, however; plaintiffs have gone to federal court in recent years in Boston and Lynn, Massachusetts, in suburban Rochester, New York, in Louisville, Kentucky, in Los Angeles, and in Seattle to challenge public school assignment policies.[14] Indeed, a small coterie of public advocates and attorneys[15] have pledged a broad attack on all race-conscious public student assignments, ensuring that such legal challenges will continue.

One possible source of public confusion about this new legal threat to public schools is that prominent conservatives have directed much of their present fire against college and university admissions policies. In those cases, they take aim at the Supreme Court's 1979 decision in the *Bakke* case, which held that the use of racial consideration as a "plus" factor in college admissions decisions does *not* violate the 14th Amendment or federal civil rights statutes.[16] The ultimate success of these ongoing challenges to *Bakke* — some of which have been successful in the lower federal courts[17] and others of which have failed[18] — ultimately will lie with the Supreme Court.

Yet none of those challenges has controlling impact on the very different issues presented when a public school board offers, not a limited number of admissions to a handful of successful college applicants, but universal assignments to every single elementary and secondary student in the system. As one district court in Washington has recently observed when approving a school board's use of race-conscious public school assignments, designed to further educational diversity and reduce racial isolation:

> *[There are] two different types of governmental programs that take race into account. On the one hand are "affirmative action" programs, such as those used in higher education admissions and contracting awards that use racial minority status as a positive factor, conferring a government benefit to members of a minority at the expense of those of the majority. On the other hand are measures, such as those designed to effect racially integrated public schools, that seek to ensure that a benefit, available to all, is distributed in a manner that the governing body has decided will benefit the citizenry as a whole.*[19]

Whether through a process of zealous overgeneralization or a more deliberate sleight-of-hand, those who press the present challenges against public school assignment policies obscure the profound differences that distinguish the two situations. The following section will examine these constitutionally significant differences.

II. The Legal Support for School Boards' Use of Race in Making Student Assignments to Public Schools

To appreciate the constitutional dimension of these issues, it is necessary to examine three bodies of law: (a) the Supreme Court's long-standing prescriptions for those school districts found to have engaged in deliberate segregation; (b) the Supreme Court's frequent and favorable acknowledgment of school board decisions that undertake voluntary, race-conscious student assignments as a matter of educational policy; and (c) the Supreme Court's decisions prescribing "strict judicial scrutiny" of all race-conscious governmental actions or decisions. In considering this third body of law, we will closely examine the three decisions within the 4th Circuit that have most aggressively and uncritically transposed general affirmative action principles designed to address government contracting and other scarce benefits cases.

A. The Supreme Court's Imposition of Mandatory, Race-Conscious Student Assignments on School Districts That Have Practiced Deliberate School Segregation

Although *Brown v. Board of Education*[20] began the long task of desegregating the nation's public schools in 1954, it was not until *Green v. County School Board*[21] in 1968 and *Swann v. Charlotte-Mecklenburg Board of Education*[22] in 1971 that the specific tools for carrying out *Brown*'s constitutional command were finally forged. *Green* and *Swann* together established the parameters for every subsequent desegregation order. *Green* imposed an "affirmative duty" upon every formerly segregated Southern school board to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[23] *Green* directed federal district judges, in overseeing the transition to "unitary status," to assess the racial impact of school board actions and identify any "vestiges" of segregation in the student attendance patterns as well as five other areas of school operations.[24]

Three years later, in *Swann*, a unanimous Court authorized district judges, as they oversaw the desegregation process, to employ a variety of sturdy remedial tools to desegregate students and schools, including: (1) express racial goals for student populations at each desegregating school; (2) express faculty and staff racial ratios; (3) administrative "pairing" of geographically dispersed neighborhoods within a school district, if necessary, to meet these student and staff desegregation goals; and (4) cross-town busing or other transportation remedies necessary to facilitate desegregation.[25] The Court in *Swann* recognized, of course, that dismantling the former dual systems would require school boards to consider race in assigning school children and teachers to desegregated schools.[26] Indeed, the Court added that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation [among students] and will thus necessarily be concerned with the elimination of one-race schools."[27]

The Court ratified race-conscious assignment policies even more explicitly in *North Carolina State Board of Education v. Swann*,[28] a companion case decided the same day as *Swann*. In this case, the Court unanimously struck down a North Carolina state law that had forbidden any assignment of school children by race.[29] Writing for the Court, Chief Justice Burger described race-conscious student assignments as an essential tool to fulfill "the promise of *Brown*" and rebuffed North Carolina's contention that the federal Constitution required "color-blind" student assignments.[30] "The [North Carolina] legislation," Chief Justice Burger observed, "exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind;'" moreover, the Court's approval of "color-blind" statutes, set "against the background of segregation, would render illusory the promise of *Brown*," and "deprive school authorities of the one tool absolutely essential to the fulfillment of their constitutional obligations to eliminate existing dual school systems."[31]

Although the Supreme Court later tackled important school issues outside the South,[32] *Green* and *Swann* set the parameters for Southern school desegregation litigation throughout the 1970s and 1980s. Hundreds of judicial decrees were implemented in formerly state-segregated districts, including scores in North Carolina, in reliance upon the unanimous holdings of these cases.

B. The Supreme Court's Frequent Indications of Approval for Public School Boards That Engage in *Voluntary* Assignment of Students To Achieve Racial and Educational Diversity

While *Swann* circumscribed the authority of *federal* courts to *order* local school boards to engage in race-conscious school assignments, the Supreme Court never suggested that school boards themselves lacked constitutional authority to do so. To the contrary, in a series of decisions, the Court strongly supported the proposition that school boards might lawfully choose to assign students to achieve racial diversity for educational reasons. The most prominent of these cases was *Swann* itself.[33] There, Chief Justice Burger contrasted the *limited* authority reposed in the federal judiciary to remedy constitutional violations with the *far broader discretion* that school boards possess when they use racial assignments for pedagogical reasons:

> *School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.* To do this as an educational policy is within the broad discretionary powers of school authorities; *absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.*[34]

Subsequently, then-Justice Rehnquist, acting on an emergency application in 1978,[35] decisively rejected a 14th Amendment argument put forward by California parents who were unhappy with a race-conscious student assignment plan being implemented in Los Angeles County.[36] Justice Rehnquist noted that the white parents' "novel" argument seemed to depend upon an assumption "that each citizen of a State who is either a parent or a schoolchild has a 'federal right' to be 'free from racial quotas and to be free from extensive pupil transportation.'"[37] Although Justice Rehnquist emphasized that California was under no obligation to undertake voluntary desegregation, he wrote that he had "very little doubt that it was permitted . . . to take such action."[38]

A third voice validating school boards' discretion to use race in making student assignments came from Justice Powell in the Denver school case in 1973.[39] Justice Powell observed that, beyond their constitutional duty to remedy prior segregation, "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation."[40] Underscoring the need in our "pluralistic society" to teach "students of all races [to] learn to play, work, and cooperate with one another," Justice Powell insisted that his opinion was not "meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."[41] In sum, Justice Powell agreed with the earlier opinions by Chief Justice Burger and Chief Justice Rehnquist, that school boards could engage in voluntary, race-conscious student assignments for educational reasons without violating the federal Constitution.[42]

In 1982, the Supreme Court addressed a statewide initiative in the State of Washington that had effectively forbidden the Seattle school district to institute a voluntary, race-conscious desegregation of its public schools.[43] The school district, which recognized that segregated housing patterns in Seattle had led to racially imbalanced schools and that its prior efforts to overcome this racial isolation had not succeeded, had formally adopted "racial balance" goals to eliminate all imbalances within three years.[44]

When the statewide voter initiative succeeded with Washington voters, the Seattle School Board went to federal court, challenging the state-imposed constraints on its local student assignment policies. The Supreme Court agreed with the Seattle board and struck down the state initiative under the Equal Protection Clause, reasoning that it "remove[d] the authority to address a racial problem — and only a racial problem — from the existing decisionmaking body, in such a way as to burden minority interests."[45] In writing for a majority of the Court, Justice Blackmun clearly signaled that no federal constitutional principles prevented Seattle school districts from carrying it out. Although Justice Blackmun acknowledged that such assignments, especially when accomplished by busing for desegregation, often engendered strong public controversy,[46] his opinion stated that in the absence of a constitutional violation, "the desirability and efficacy of school desegregation are matters to be resolved through the political process."[47] The Supreme Court's decision thus freed the local school board to resume its voluntary efforts to desegregate its schools by race, achieve racial diversity, and end racial isolation, despite state efforts to impede the choice of the local board.[48]

One of the most difficult and contentious issues to confront the Supreme Court during the 1970s was whether public institutions of higher education could use race as a criterion for admission to their institutions. In *Regents of the University of California v. Bakke*[49] in 1978, a disappointed applicant to the University of California at Davis Medical School challenged a policy that set aside 16 out of 100 seats in each entering class for applicants from certain minority groups.[50] Justice Powell concluded while a state's use of race in making admissions decisions should prompt strict judicial scrutiny by a federal court — necessitating proof that the state's race-conscious means were "precisely tailored" to accomplish its "compelling" state interest[51] — the "attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education."[52] In sum, Justice Powell's opinion held that student diversity in higher education *is* a compelling state interest sufficient to survive strict scrutiny by a federal court.[53] In subsequent years, Justice Powell's opinion in *Bakke* became a familiar guidepost used to shape thousands of voluntary admissions policies, not only for institutions of higher education, but for elementary and secondary schools as well.[54] The Supreme Court, fully aware of this widespread reliance on its *Bakke* opinion by educational authorities, neither renounced nor sought later reconsideration of that decision.

In sum, then, the Supreme Court or various of its Justices, in nearly half a dozen decisions rendered over a 30-year period — *Swann*, *Bustop, Inc.*, *Keyes*, *Bakke*, and *Seattle School District No. 1* — offered express approval of, and gave constitutional sanction to, the voluntary use of race-conscious student assignment policies by states or local school boards to achieve ends of educational diversity to end racial isolation in schools.

III. The Supreme Court's Recent Affirmative Action Decisions: Their Dubious Significance for School Boards That Wish To Assign Elementary and Secondary Students To Achieve Racial and Educational Diversity

The new "colorblind" challenge to student assignment policies relies principally upon certain Supreme Court affirmative action decisions announced since 1989, especially two decisions rendered in the governmental contracting area, *City of Richmond v. J.A. Croson Co.*[55] and *Adarand Constructors, Inc. v. Pena.*[56] From those cases, they draw the premise that state or federal governmental actors may not engage in any race-conscious governmental decisions *unless* (1) they are pursuing ends that are found constitutionally "compelling" and (2) the means they have chosen to achieve those "compelling" ends are "narrowly tailored" to avoid unnecessary racial harm. This two-part constitutional litmus test — demanding both a compelling governmental interest and a narrowly tailored means — has indeed become a commonplace of 14th Amendment jurisprudence. Public school assignment policies admittedly must survive just such a judicial review.

It is in taking the next step that these new decisions so clearly falter, for the Supreme Court cases set forth above strongly suggest that assigning students to public schools to assure racial diversity *is* a compelling end, and the means employed by most American school boards to achieve these ends *are* narrowly tailored enough to survive judicial review. The new federal decisions, however, disagree on one (or both) of these two points. Some decisions have held or suggested that achieving racial or "educational diversity" can never be a compelling end; they argue that only government actions to remedy its own prior segregative policies can ever meet that standard. Other decisions have held or assumed that educational diversity may be compelling, but have concluded, oddly enough, that school boards' use of race in assigning students is an unacceptable means to achieve racial diversity in schools.

This section will carefully examine these contentions, focusing on the Charlotte-Mecklenburg school decision rejecting educational diversity as a "compelling end" for school boards, and two sister decisions from the 4th Circuit concluding race-conscious assignments are an unacceptable means of achieving that end.

A. Can Educational Diversity Be a "Compelling State Interest"? The Limited Relevance of the Supreme Court's Affirmative Action Decisions

The first decision we must examine was rendered by a federal district court in 1999 in the historic *Swann v. Charlotte-Mecklenburg School Board* case (later redesigned *Capacchione v. Charlotte-Mecklenburg Schools*[57] in the district court litigation in 1999–2000, and most recently resdesignated as *Belk v. Charlotte-Mecklenburg Board of Education*[58]). This decision, which we will call *Swann/Capacchione*, concluded that the Charlotte-Mecklenburg School Board could not lawfully adopt school assignment policies that take race or ethnicity into account, even to maintain educational diversity, once the board had finally met its constitutional obligations under the Supreme Court's *Swann* decision and been declared "unitary." The linchpin of the ban announced by the *Swann/Capacchione* court was its assertion that "[m]odern Supreme Court precedent" could not countenance educational diversity as an acceptable end, since that precedent recognizes only *one* proper state interest that would justify race-based classifications: remedying the effects of a school board's own past racial discrimination.[59]

1. The Dubious Argument for Limiting States to the Remedial Ends: The Supreme Court Precedent That's Just Not There

The "[m]odern Supreme Court precedent" invoked by the district court began with Justice O'Connor's opinion in *City of Richmond* *v. J.A. Croson Co.*[60] The battle among the contending parties in *Croson,* as Justice O'Connor recounted it, was "the scope of [the City of Richmond's] power to adopt legislation designed to address the effects of past discrimination"[61] by setting aside a portion of Richmond's city contracts for minority business enterprises. The *Croson* Court identified two *remedial* interests that might justify Richmond's reliance on those racial considerations — redressing its own prior, proven discrimination, or ending its "passive participation" in an entrenched system of racial exclusion in the private market.[62] For our purposes, what is crucial is that Justice O'Connor was concerned with possible *remedial* uses of race-conscious standards. *Croson* simply was not a case in which the Court set out to identify the full roster of state interests that might justify state use of racial distinctions. Instead, it addressed a more limited question: what is the authority of a state or city to use race *within a remedial context*? The answer *Croson* gave was that remedial uses of race by state actors must be carefully circumscribed.

To be sure, one voice in *Croson* strongly urged that the *only* permissible use of race by government is to achieve remedial ends, and that even then such uses must be employed sparingly. The voice was that of Justice Scalia, who summarized his contention as follows: "In my view there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."[63]

Justice Scalia indeed spoke to the very issue now under consideration in the school assignment cases — the authority of school boards to use voluntary, race-conscious methods *outside* of a remedial context. Scalia acknowledged prior Supreme Court cases, including *Green* and *Swann* that had sanctioned the use of race-conscious student assignment policies to remediate prior school board discrimination. He contended that this was the *only* appropriate use of race: "[I]t is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race."[64]

If Justice Scalia had spoken for the unanimous Supreme Court, or even for a bare majority of Justices, both *Swann/Capacchione* and the new federal decisions would have identified a controlling "[m]odern Supreme Court precedent." Yet no other Justice chose to join Scalia. Indeed, Justice O'Connor's opinion seemed meant deliberately to repudiate his extreme position, noting that

> *the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by* assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. *The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.*[65]

In other words, Justice O'Connor implied, contrary to Justice Scalia's view, that there *are* state goals "important enough to warrant use" of racial considerations, even though such uses are subject to strict judicial scrutiny to ferret out "illegitimate" legislative motives such as "racial prejudice or stereotype."[66]

A majority of the Court reemphasized this point in several later cases. For example, Justice O'Connor again sought to correct the misapprehension that all governmental uses of racial classifications are forbidden in *Adarand Constructors Inc. v. Pena* in 1995: "Strict scrutiny does not 'trea[t] dissimilar race-based decisions as though they were equally objectionable," she wrote; "to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not.'"[67] By requiring strict scrutiny of racial classifications, she explained, "we require courts to make sure that a governmental classification based on race . . . is legitimate, before permitting unequal treatment based on race to proceed."[68]

As in *Croson*, Justice Scalia disagreed with the majority's conclusion in *Adarand*, insisting that race-conscious classifications should only be used to provide remedies to the proven victims of the state's own prior discrimination.[69] Justice Scalia's argument managed to win the agreement of one additional Justice, Clarence Thomas, who wrote separately that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice."[70]

Thus, in the two key affirmative action cases, *Croson* and *Adarand*, only two of the Court's nine justices supported the position that school assignment opponents presently seek to establish. In both of those cases, moreover, all four dissenters wrote to endorse a far broader range of compelling state interests that might justify a state's adoption of race-conscious policies. For example, Justice Stevens argued in *Croson* that the Equal Protection Clause should be interpreted to permit the race-conscious selection of public school teachers if a "school board had reasonably concluded that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white, faculty."[71] He later noted in *Adarand* that the majority had not reached or decided the question of diversity as a possible compelling governmental interest: "[The] proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today — indeed, the question is not remotely presented in this case."[72]

Justice Marshall, writing for himself and Justices Brennan and Blackmun in *Croson*, would not only have subjected race-conscious state classifications to a much lower level of judicial scrutiny,[73] but would have upheld a state goal of remedying prior societal discrimination as well as "the prospective [goal] . . . of preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination."[74] Finally, in *Adarand*, both Justice Souter, in a dissent joined by Justices Ginsburg and Breyer, and Justice Ginsburg, in a dissent joined by Justice Breyer, voiced support for race-conscious actions by state and federal governments that were designed to diminish lingering racial discrimination in the broader society.[75]

To summarize the analysis thus far, the only direct support for the view of "[m]odern Supreme Court precedent" upon which the district court relied in *Swann/Capacchione* has come from two Justices, Scalia and Thomas, who have never attracted additional support. To the contrary, their views appear to have been considered and repudiated, not only by the four more liberal members of the current Court (Justices Stevens, Souter, Ginsburg, and Breyer), but also by Justices O'Connor and Kennedy, and Chief Justice Rehnquist as well, in both *Croson* and *Adarand*.[76]

Beyond *Croson, Adarand*, and a sentence from the *Metro Broadcasting* dissent (which cannot bear the weight the *Capacchione* court intended for it),[77] the *Swann/Capacchione* court's reference to "[m]odern Supreme Court precedent" dwindles to nothing more than a single 5th Circuit case, *Hopwood v. State of Texas*.[78] To be sure, *Hopwood* did repudiate the use of race, at least in the higher educational context.[79] Yet *Hopwood* is not a Supreme Court decision, nor did the Supreme Court subsequently affirm it.[80] It was, instead, a bold departure by a lower federal court, like *Capacchione*, that set sail against the winds of prior Supreme Court precedents — ignoring *Swann, Bustop, Inc.*, and *Bakke* — with apparent confidence that it could foresee a future time in which the Court would repudiate its former handiwork. In sum, then, *Swann/Capacchione*'s conclusion that educational diversity could never be deemed 'compelling' under the Equal Protection Clause has no substantial support.[81]

2. The Argument for Limiting States to Remedial Ends: The Rationales That Simply Don't Apply

It is perhaps unjustified to judge the work of these new federal courts solely on the strength of the precise legal holdings of prior cases. If the underlying concerns that prompted the Supreme Court in *Croson* or *Adarand* to reject race-conscious classifications in those cases can be shown to extend to the elementary and secondary school context, then the district court's decision might be vindicated through the power of well-reasoned analogy. To evaluate these new decisions on these grounds, it is first necessary to identify the considerations that have prompted the Supreme Court to guard against the unreflective use of race-conscious state classifications. In *Croson*, Justice O'Connor spoke of several such considerations: (1) the "'personal rights' of all citizens to be treated with equal dignity and respect";[82] (2) the need to avoid "illegitimate notions of racial inferiority"; (3) the risk that racial classifications might become a form of "simple racial politics"; (4) "a danger of stigmatic harm"; and (5) the prospect of "'reinforc[ing] common stereotypes.'"[83] The Supreme Court has also worried about "giving local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field."[84]

Most of these concerns arise, however, when a government must award a scarce resource to one among several rival claimants of different races — whether a government construction contract (*Croson, Adarand*), a government franchise (*Metro Broadcasting*), a seat in a graduate or professional school (*Bakke, Hopwood*), a merit-based scholarship (*Podberesky v. Kirwan*[85]), or a seat in a competitive-exam high school (*Wessmann v. Gittens*[86]). When such glittering prizes are being bestowed, it is plausible to reason, as the district court did in *Swann/Capacchione*, that "'the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.'"[87] It seems instinctively "unfair" or "unequal" if such decisions, which ought be based upon worth or merit — lowest bid, best qualified, most competitive — tip toward one less qualified or less competitive solely because of his or her race or ethnicity. Moreover, if others sense that recipients actually are inferior, their suspicions will not only breed resentment but also will ultimately stigmatize those who have been selected on racial grounds.

Access to second-grade teachers or fifth-grade classrooms, however, is not a scarce resource but a public good. Every child is sent to school; no child is denied. Of course, every public elementary and secondary school has its own special characteristics: its history, its identifying architectural features, its corps of teachers (each with their own special talents and personalities). Yet as Chief Justice Rehnquist observed in *Bustop, Inc.*, there is no "federal right" granted any parent or child that assures attendance at any particular public school.[88] For legal purposes, public schools have been deemed equivalent and fungible, and to that extent, at least, our law normally recognizes no "winners" and "losers" in the distribution of public school resources.[89] Therefore, a child's assignment to a particular elementary school does not stigmatize in the ways that worried Justice O'Connor in *Adarand* and *Croson*, because the criteria for assignment do not reflect adversely upon the character of students or their ability to perform.

Some recent cases have involved the use of racial criteria in the context of special "merit schools," i.e., public schools where admission is normally predicated on objective indicia of excellence. The 1st Circuit's recent decision in *Wessmann v. Gittens*[90] offers perhaps the greatest support for this position, and it understandably became a source of special reliance in the Charlotte litigation.[91] *Wessmann* involved the use of race as one criterion for admission to such a merit school, Boston Latin, where access was normally reserved for students with the highest scores on competitive merit examinations. The 1st Circuit's decision held that when school boards operate special schools with the goal of nurturing exceptional talent, no child should be deprived of a place earned on the merits, because of inflexible racial considerations — even to further diversity ends.[92] Student assignments to most public schools, by contrast, are not made on the basis of merit, and *Wessmann*'s logic simply does not extend to those routine choices, as two Massachusetts federal courts have since concluded when addressing challenges against ordinary student assignment practices in other Massachusetts school districts.[93]

To summarize, then, neither the affirmative action decisions of the Supreme Court nor the logic and rationale of those decisions hold or suggest that school board efforts to achieve racial and educational diversity in America's public schools are impermissible ends. As we will see later, the overwhelming weight of educational research and informed public policy argues strongly to the contrary. Bringing the children of this multiethnic nation together to live and learn in our classrooms and schoolyards is one of the most compelling objectives for state and local governments in the early 21st century.

B. Are Race-Conscious Student Assignment Policies "Narrowly Tailored"?

In two sister decisions announced in 1999, both of which examined school assignment policies — one from Arlington County, Virginia, *Tuttle v. Arlington County School Board*,[94] and the other from Montgomery County, Maryland, *Eisenberg v. Montgomery County Public Schools*[95] — the 4th Circuit has declared that it will assume, at least until the Supreme Court declares otherwise, that efforts to achieve "diversity in student populations" *do* further a constitutionally sufficient end. Yet both decisions faulted school board assignment policies for being insufficiently "narrowly tailored" to survive the second prong of the Supreme Court's strict scrutiny test.

In reaching its conclusion, *Tuttle* looked to five "narrow tailoring" criteria that had earlier been cited by the Supreme Court in *United States v. Paradise*,[96] an affirmative action case involving employment discrimination in the hiring of Alabama state troopers. The five *Paradise* factors included:

> *(1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties.*[97]

In measuring Arlington's policies against these five factors, the *Tuttle* court began by noting that a local committee, studying admissions policies in Arlington County, had identified an alternative assignment policy, not adopted by the school board, that would have been race-neutral. The court concluded that since this alternative proposal would have been race-neutral, the board's race-conscious policy was not tailored narrowly enough to avoid the unnecessary use of racial considerations."[98]

Yet the *Tuttle* panel stopped too soon, for the Supreme Court had earlier made clear that when examining this "narrow tailoring" requirement, a court's job did not end simply because it had identified an alternative, race-neutral plan. Lower courts are instead obligated to "examine the purposes the [challenged school policy] was intended to serve" and determine whether alternative means would *equally or better serve to carry out those purposes*."[99] Moreover, the *Paradise* Court admonished that a remedial plan need not be limited to "the least restrictive means of implementation." It recognized that the "choice of remedies to redress racial discrimination is 'a balancing process.'"

The *Tuttle* panel next turned to consider the "planned duration of the [p]olicy" instituted by the Arlington school board.[100] Quoting Justice O'Connor's opinion from *Croson*, the court proposed an invariable rule that "a racial classification cannot continue in perpetuity but must have a 'logical stopping point,'" and concluded that the Arlington policy was not "narrowly tailored" because it was of apparently indefinite duration.[101] Once again, this approach avoids serious reflection on the purpose of the criterion. When the government's objective is the remediation of its own prior discrimination, the need will usually be only temporary, until it has redressed the wholesale exclusion of the previously underrepresented racial group. Under those circumstances, it is logical for courts to insist upon a stopping place. By contrast, a school board's objective in creating a diverse student population is not for remediation of past misdeeds but to further a future goal of best educating children who will live and work in a heterogeneous, multiracial nation. That need is not short term but long term, extending at least as long as America's racial and ethnic groups maintain any separate cultural and social identity.[102]

In its consideration of the third *Paradise* factor, what seemed dispositive to the *Tuttle* panel was its view that "racial balancing" was driving the entire Arlington County process.[103] For the *Tuttle* panel, the desire for racial balance seemed sufficient to condemn the Arlington policy without further analysis or citation; the *Eisenberg* court agreed, citing a number of cases that purportedly condemned racial balancing. Yet what those Supreme Court cases actually condemned was racial balancing ordered *by federal courts*.[104] As we noted earlier, the Supreme Court expressly distinguished in *Swann* between the limited authority of federal courts to order racial balancing to remedy a proven constitutional violation and the "broad power" of school boards "to formulate and implement educational polic[ies that] might well [include] . . . a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."

The *Tuttle* panel turned next to the fourth of the five *Paradise* factors, "the flexibility of the [state's race-conscious] policy."[105] The panel contrasted Justice Powell's favorable discussion in *Bakke* of Harvard's flexible admissions plan, one that considered race a "plus" factor in reviewing applications — Harvard was, by the 4th Circuit's lights, "'treat[ing] each applicant as an individual in the admissions process" — with the more inflexible policies that, like those of the Arlington school board, did "not treat applicants as individuals."[106] Yet the differences between Harvard and the Arlington public schools are manifest. Elementary students have no enforceable right to be "treated as individuals" when being assigned to public schools. Indeed, there is little pretense that school boards weigh student abilities or interests at all in making school assignments. Residential location has traditionally been determinative, and district lines are adjusted every few years—often dividing streets and neighborhoods in ways that would be judged purely arbitrary if assessed in terms of the needs or interests of the individual children on each street. Yet because school districts deliver a system of "common, public schools, available to all," their schools are deemed fungible for legal purposes, and students are deployed to different schools at the discretion of the school board. As one recent federal court in Massachusetts observed in upholding a race-conscious transfer program in the Lynn public schools:

> *As compared to the Boston Latin School [the competitive school at issue in the* Wessmann *case] the schools in the Lynn system are more fungible. Nothing indicates that one school is considered clearly superior to all others. While parents' subjective preferences for certain schools may be strong, there is no clear objective benefit to attending any one school over another. In this sense, the plan is merely race-*conscious *in deciding where students will be eligible to attend school, not race-*preferential *in deciding which students may attend better schools.*
>
> *Moreover, no merit issues are involved. The policies do not grant preferences to students of one race who are objectively less qualified than students of other races. Unlike many challenged race-based programs, more qualified applicants are not excluded from access to a scarce resource or benefit. No one is excluded from participating in the benefit; all students attend a school.*[107]

Of course, if and when school boards institute public *merit* schools limited to students with exceptional needs or abilities, they normally undertake individualized consideration among potential applicants. At that point (though not before) the concerns voiced in *Bakke* begin to outweigh a school board's unilateral authority. Neither *Tuttle*'s weighted lottery plan for magnet schools nor *Eisenberg*'s transfer plan, however, purported to assess the individual merit of student applicants for magnet schools or transfers; thus, the considerations of fairness that were central in the 1st Circuit's decision in the *Wessmann* decision are not applicable in the more routine assignment case.

The final *Paradise* factor considered in *Tuttle* was "the burden on innocent third parties" whom it depicted as "young kindergarten-age children."[108] The court suggested it would be ironic for the Arlington board "to teach young children to view people as individuals rather than members of certain racial and ethnic groups [and yet] classif[y] those same children as members of certain racial and ethnic groups."[109] Such assignment policies, however, are neither ironic nor self-contradictory. What public school students learn from each other when they arrive at school is neither limited to, nor constrained by, the assignment plans that have brought them together. Schools, principals, and teachers often mix together elementary students for a variety of reasons: those with different academic strengths; boys with girls; stronger readers with weaker — all to pursue valid educational goals. Schools have done so at every academic level from time immemorial. It is simply untrue that the deliberate use of racial classifications will necessarily lead students to think of their classmates only in racial or ethnic terms.

Indeed, it is far more likely that if willing school boards cannot assign students to schools by race or ethnicity, we risk a return to a time when each school child could (and did) identify "white schools" and "black schools," simply by reference to the predominant race of the children who attended them. Far more certainly than school boards' good-faith efforts to assure educational diversity, this *de facto* resegregation of our schools will re-create the conditions condemned in *Brown* in 1954.

Beyond the 4th Circuit's mistaken reliance upon the five *Paradise* factors in assessing the adequacy of the school board's "narrow tailoring" of their race-conscious plans, the more fundamental failure of these two 4th Circuit cases was their neglect of the deeper questions that "narrow tailoring" presents in the public school context. Both decisions purported to accept educational diversity as a constitutionally acceptable end. Yet if achieving diversity in local school populations is indeed *compelling*, why may school boards not work to attain it in the most direct and logical way — assigning children to assure that every school will reflect racial and ethnic diversity? The 4th Circuit's best (non)answer seems to be that school boards may only achieve racial diversity *indirectly*, by employing nonracial assignment considerations.

Yet that answer betrays an underlying conceptual misunderstanding. If a school board that employs another, racial-neutral assignment plan fails thereby to achieve actual racial and ethnic diversity in its schools, may it try again? Surely it would be untenable for federal courts to say 'no,' that is, to acknowledge a state interest as compelling, yet refuse to allow the means necessary to attain it. On the other hand, if school boards *may* try again, then presumably they can try a succession of race-neutral methods, one after another, until they find one that succeeds in achieving racial diversity. Yet this brings us full circle, for if a school board may permissibly pursue school diversity as a race-conscious goal, why is it impermissible to take a direct route rather than an administratively cumbersome, analytically dubious, path toward the same end?

The best, though unsatisfying, answer may be the courts' concern to avoid harm to "innocent parties" to the full extent possible; indeed, the two opinions voice precisely this concern. Yet when a school board is distributing a common good—when its assignments are made not to the most meritorious, or to the lowest bidder, or to the most reliable company, but to all — there simply *are* no victims in the sense that has troubled federal courts in other, zero-sum-game contexts.

Were the Tuttle plaintiffs disappointed when their daughter was denied attendance at the Arlington Traditional School? Of course they were. But every autumn, hundreds of thousands of parents are similarly disappointed when they learn that their children have been assigned to public schools not of their hearts' desire. Dispatching children to new and unfamiliar schools can provoke apprehension in parents and children alike. Yet federal and state laws do not recognize these anxious parents as legal victims, with rights to vindicate or losses that entitle them to seek compensation. There are no principles of constitutional educational law that afford a cognizable, vested liberty or property interest in attending any particular elementary and secondary school.[110]

In sum, then, our close evaluation of the legal evidence has reached three conclusions. First, the Supreme Court has long directed school boards to employ race-conscious student assignment policies to remedy their own prior creation and maintenance of segregated public schools. Second, the Supreme Court has sent strong signals, for at least 30 years, that public school authorities may voluntarily take race or ethnicity into account in order to achieve educational diversity or eliminate lingering racial isolation when they assign children to public schools. Third, the Supreme Court's constitutional decisions in the contracting, set-aside, and employment area simply do not support the broad extension of a "colorblind" approach to school boards that assign elementary or secondary students to public schools for educational diversity ends.

Conservative advocates who now support a contrary position doubtless have strong ideological convictions in doing so; some may actively wish for, or be indifferent to, the widespread racial resegregation that will certainly follow if their arguments are broadly accepted. They cannot plausibly claim, however, that their misguided course is compelled either by the 14th Amendment or by the prior jurisprudence of the Supreme Court.

IV. The Crucial Need for Educational Diversity in Coming Decades

Although this essay has dealt chiefly with legal considerations, school boards — in shaping the essential mission of the public schools — normally begin with careful consideration of the chief educational interests at stake. In a world growing more racially and ethnically interdependent every year, many boards nationwide have concluded that children have compelling educational interests in learning more about children of other racial and ethnic backgrounds. From that exposure, children can discern for themselves the role that racial background plays (or very often, does *not* play) in students' responses to good literature, their thoughts on civic issues, their work together in groups, and the way they approach contemporary problems. Indeed, the pedagogical objective in assuring racially diverse classrooms seems founded not upon some chimerical stereotype about 'what African American children think' or 'how Hispanic children behave,' but on precisely the *opposite* view — that all children share many more things in common than they do differences and that the best device for overcoming the lingering racial suspicions or prejudices is exposure, not separation.

These judgments rest upon a large body of social scientific evidence, conducted in the past two decades, that strongly confirms the desirability of integrated schooling.[111] Public schools present many children with their first and only public interracial experiences.[112] Such experiences often lead to significant reductions in racial stereotyping among students, reduced interracial anxieties, and positive responses to persons of other races in interracial vocational settings.[113]

Interracial exposure strongly affects future life trajectory as well. One extensive ongoing study of minority children who moved from segregated Chicago city schools to integrated suburban Chicago schools has established that these integrated children are subsequently "more likely to be (1) in school, (2) in college-track classes, (3) in four-year colleges, (4) employed, and (5) employed in jobs with benefits and better pay.[114] Studies in other school districts confirm that desegregated educational experiences can lead to significant improvements in the higher educational attainment, employment success, and residential community choice of minority students.[115]

In addition, desegregation has been shown to positively affect the academic performances of minority students. Professors Christopher Jencks and Meredith Phillips report extensive research suggesting that "[d]esegregation seems to have pushed up southern blacks' [school test] scores a little without affecting whites either way." Professors Rita Mahard and Robert L. Crain have found that desegregated public school experiences by students who began desegregated education in the early grades had significant, though modest, improvements in the tests scores of minority students.[116]

One federal court in Washington State recently summarized such a body of expert evidence in a case challenging student assignment plans:

> *The research shows that a desegregated educational experience opens opportunity*

> *networks in the areas of higher education and employment, particularly for minority students, which do not develop when students attend less integrated schools. . .*
>
> *The research shows that academic achievement of minority students improves when they are educated in a desegregated school, likely because they have access to better teachers and more advanced curriculum. The research also shows that both white and minority students experienced improved critical thinking skills — the ability to both understand and challenge views which are different from their own — when they are educated in racially diverse schools.*
>
> *. . . The research clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more democratic and inclusive experience for all citizens. . . . Recent research has identified the critical role of early school experiences in breaking down racial and cultural stereotypes.*
>
> *Research . . . shows that, as a group, minority students who exited desegregated high schools were more likely to be employed in a racially diverse workplace, obtained more prestigious jobs than those who did not, and that their jobs tended to be higher paying than those students who did not attend desegregated schools.*[117]

A number of the new federal decisions, including that of the district court in *Swann/Capacchione*, have conceded the significance of much of this evidence, noting "that children may derive benefits from encounters with students of different races."[118] Yet the *Swann/Capacchione* judge nonetheless condemned the Charlotte-Mecklenburg school board's "single-minded focus on racial diversity" and ordered that students be viewed as individuals, not "as cogs in a social experimentation machine."[119]

It is the prospect that additional federal court decisions may soon follow, replacing the carefully considered, extensively debated, good-faith judgment of elected school board officials with an inflexible role nowhere found in the Constitution or the precedents of the Supreme Court, that presently pose a real and immediate threat to the educational experiences of millions of American school children.

V. The Indispensable Role To Be Played by Federal and State Officials in Maintaining Racially and Ethnically Diverse Public Schools

A legal campaign is underway, as we have seen, one with a far-reaching agenda. It would forbid all American school boards from taking race or ethnicity into account when they assign students to particular schools (even from considering racial demography when they redraw school attendance zones).[120] Many school boards simply do not have the legal sophistication to counter the well-financed, expertly counseled, ideologically driven foe they now face. Although the traditional civil rights groups have served as counsel in a number of these cases, they have small budgets, face many competing litigation priorities, and ultimately lack the capacity to respond to these attacks in every forum in which they may arise.

The U.S. Department of Justice has played a crucial role in mounting or assisting in many school desegregation cases during the past 40 years.[121] More recently, its voice and resources have played an important role in affirming that educational diversity is an end sufficiently compelling to survive strict judicial scrutiny under the Equal Protection Clause.[122] It will be of greatest importance in the coming decade, as school boards struggle to educate American children for life in a nation and a world grown ever more diverse, for the Department of Justice to support — with its prestige as well as its legal resources — the critical distinction between government consideration of race in various zero-sum contexts and voluntary, good-faith efforts by willing school boards to assure that their elementary and secondary schools do not become racially and ethnically isolated, one from another. For, as Chief Judge J. Harvie Wilkerson, III, has observed:

> *The values of* Brown *are most poignantly implicated [in public education], because society has traditionally relied upon public schools to lay the bedrock for integration. Elementary and secondary schools were not only designed to prepare students for the challenges and opportunities of American life; they were also meant to serve as melting pots where interracial friendship could counteract prejudice at an early age. Separatist educational arrangements threaten both of these goals.*[123]

Nothing less than a "separatist educational arrangements" is at stake in litigation that would deprive school boards of the discretion to assure students the opportunity to learn in schools "meant to serve as melting pots where interracial friendship could counteract prejudice at an early age."

Endnotes

[1] 347 U.S.C. § 483 (1954).

[2] *See Richmond v. J.A. Croson Co.*, 488 U.S.C. § 469 (1989) (municipal construction contracts); *Adarand Constructors, Inc. v. Pena*, 515 U.S.C. § 200 (1995) ("*Adarand*") (federal construction contracts).

[3] *See U.S. v. Paradise*, 480 U.S.C. § 149 (1987) (hiring of state troopers); *Wygant v. Jackson Board of Education*, 476 U.S.C. § 267 (1986) (layoffs of public school teachers).

[4] *See Regents of University of California v. Bakke*, 438 U.S.C. § 265 (1978) (admission to medical school); *see also Hopwood v. Texas*, 78 Federal Reporter 3d 932 (5th Circuit 1996) (admission to law school).

[5] *See Shaw v. Hunt*, 517 U.S.C. § 899 (1998); *Miller v. Johnson*, 515 U.S.C. § 900 (1995); *Shaw v. Reno*, 509 U.S.C. § 630 (1993).

[6] *Adarand*, 515 U.S.C. § at 223.

[7] *Id.* at 237.

[8] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S.C. § 1, 16 (1971) ("*Swann*") (observing that a school board decision to require each school to meet "a prescribed ratio of Negro to white students . . . as an educational policy is within the broad discretionary powers of school authorities").

[9] Of course, the crucial link between colorblindness and these dire educational and social consequences lies in the nation's continued residential segregation, a social reality even the "colorblind" can surely see. Although some school boards may turn to creative alternatives, *see* Elizabeth Jean Bower, Note, "Answering the Call: Wake County's Commitment to Diversity in Education," 78 *North Carolina Law Review* 2026 (2000) (describing the Wake County, North Carolina plan, which will rely on both student test scores and parental income levels to distribute school children among Wake County schools), most school boards, if no longer able to consider race or ethnicity as they make student assignments, will experience strong political and social pressures to assign students based upon their neighborhood of residence. And throughout the nation at large, most of those neighborhoods are currently, and long have been, segregated by race, and to a lesser extent by socio-economic class. *See generally* Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass*, at 61-88, tables 3.1, 3.3, 3.4 (1993) (describing and documenting the persistence of residential segregation and "hypersegregation" in major metropolitan areas in every geographical region of the United States in 1970 and 1980); Reynolds Farley and William H. Frey, "Changes in the Segregation of Whites from Blacks during the 1980s: Small Steps toward a More Racially Integrated Society," 59 *American Sociological Review* 1 (1994) (documenting a slight overall decline

in average residential segregation from 1980 to 1990, measured by the widely used "dissimilarity index," from 78.8 to 74.5); *see also* John Yinger, "Housing Discrimination Is Still Worth Worrying About," 9 *Housing Policy Debate* 893, 910-11 (1998) (noting that these declines reported by Farley and others are "modest," and insisting that "[t]he degree of [residential] segregation between blacks and whites, by any measure, remains far above the degree observed between any other two large groups," which rarely exceed 30 among any European ethnic group); Gary Orfield and Susan Eaton, *Dismantling Desegregation: The Quiet Reversal of* Brown v. Board of Education, at 291-300 (1996) ("*Dismantling Desegregation*") (examining the close relationship between housing segregation and the educational isolation of minority students, and federal judicial reluctance to acknowledge either the relationship or the extensive governmental complicity in perpetuation of segregated housing).

[10] *See* William L. Taylor, "The Continuing Struggle for Equal Educational Opportunity," *in Race, Poverty, and American Cities*, at 463-70 (John Charles Boger and Judith Welch Wegner, eds., Chapel Hill, NC: University of North Carolina Press 1996) (reviewing evidence on the positive educational benefits of desegregation); Gary Orfield, "Unexpected Costs and Uncertain Gains of Dismantling Desegregation," *in Dismantling Desegregation* at 73-114 (reviewing both the positive benefits of school integration and the unrecognized costs of resegregation).

[11] 195 Federal Reporter 3d 698 (4th Circuit 1999), *cert. dismissed*, 120 Supreme Court Reporter 1552 (2000).

[12] 197 Federal Reporter 3d 123 (4th Circuit 1999), *cert. denied*, 120 Supreme Court Reporter 1420 (2000).

[13] *Capacchione v. Charlotte-Mecklenburg Schools*, 57 Federal Supplement 2d 228 (W.D.N.C. 1999), *aff'd in part and rev'd in part sub nom. Belk v. Charlotte-Mecklenburg Board of Education*, 269 Federal Reporter 3d 305 (4th Circuit 2001) (*en banc*).

[14] *See generally, Boston's Children First v. Boston*, 98 Federal Supplement 2d 111, 112-14 (D. Massachusetts 2000) (denying school committee's motion to dismiss plaintiffs' allegations that the Boston School Committee's creation of attendance zones, based in part on racial considerations, violates the 14th Amendment and other federal and state laws); *Comfort v. Lynn School Committee*, 100 Federal Supplement 2d 57 (D. Massachusetts 2000) (denying injunctive relief to plaintiffs who allege that school district's plan, which limits student transfers that might increase racial isolation or imbalance, violates the 14th Amendment and various federal and state statutes); *Brewer v. West Irondequoit Central School District*, 212 Federal Reporter 3d 738 (2d Circuit 2000) (vacating a district court injunction that had forbidden a school board's use of race-conscious assignment policies as a 14th Amendment violation and remanding for a full trial on whether the goal of reducing racial isolation constitutes a sufficiently compelling interest to justify race-conscious assignments to public schools); *Rosenfeld v. Montgomery County Public Schools*, 2001 U.S. App. LEXIS 27330 (4th Circuit, Dec. 27, 2001) (affirming, the dismissal, for lack of legal standing, of a challenge brought by white parents who alleged that Montgomery County's assignment plan for "gifted and talented" students relied, in part, upon racial considerations); *Hampton v. Jefferson County Board of Education*, 102 Federal Supplement 2d 358, 382 (W.D. Kentucky 2000) (dissolving a 25-year-old school desegregation decree and enjoining any further use of race-conscious admissions for a special magnet high school that operated to exclude African American students from those programs); *Hunter v. Regents of University of California*, 190 Federal Reporter 3d 1061, 1067 (9th Circuit 1999) (rejecting a challenge to the race-conscious selection of elementary students for admission to a university-based, research-oriented public school that sought, as part of its mission, to study the effects of racial integration); *Parents Involved in Community Schools v. Seattle School District No. 1*, 137

Federal Supplement 2d 1224 (W.D. Washington 2001) (rejecting the claim that the 14th Amendment and federal statutes forbid the Seattle School Board from considering race in making school assignments, even for the objectives of encouraging racial diversity and combating de facto racial segregation). *See also Lutheran Church-Missouri Synod v. FCC*, 141 Federal Reporter 3d 344, 354 (D.C. Circuit 1998) (suggesting that racial diversity may never be a compelling governmental interest).

[15] The Center for Individual Rights (CIR) and the Institute for Justice are both active on this issue. The CIR has crafted a litigation campaign to challenge any use of race, proclaiming in its web site that:

> *CIR is perhaps best known for it role as counsel to the plaintiffs in* Hopwood v. Texas, *a constitutional challenge to racial preference in student admissions. Hopwood was the first successful challenge since the Supreme Court 1978 ruling in the Bakke decision. The Fifth Circuit's decision in Hopwood is widely viewed as the most important civil rights case of the 1990s. CIR since has moved to extend the Hopwood holding through legal challenges to racially discriminatory admissions systems in other judicial circuits, including the University of Washington Law School [*Smith v. University of Washington Law School, *CV No. C-97-335 (W.D. Washington filed Mar. 5, 1997)] and the University of Michigan.*

See <http://www.cir-usa.org/cr-aa.htm>. See generally "Beachhead for Conservatism," *National Law Journal*, Dec. 27, 1999, at A11 (naming the Center as its "runners-up" for lawyers of the year and explaining that while "[s]everal conservative groups are fighting similar battles — the Institute for Justice and the Washington Legal Foundation, among others — . . . CIR has been especially effective, carefully selecting both its battles and the circuits they fight them in, with an eye to victory").

The Institute for Justice, which describes itself alternatively as "our nation's only libertarian public interest law firm" and as a "merry band of libertarian litigators," *see <http://www.ij.org/profile/index.html>, <http://www.ij.org/merry_band/index.html>*, has identified opposition to racial preferences as one of the six legal areas in which its work focuses, although that work to date seems directed more toward the active support of citizen initiatives or referenda, in states such as California and Washington, to ban all race-conscious governmental actions, than toward participation in litigation. *<http://www.ij.org/cases/index.html>*.

[16] *Regents of the University of California v. Bakke*, 438 U.S.C. § 265 (1978) ("*Bakke*"). The plaintiff in that case was a disappointed applicant to the University of California at Davis Medical School who challenged a policy that set aside 16 out of 100 seats in each entering class for applicants from certain minority groups. In resolving this challenge, the Court fractured into three groups. The first group, a more liberal faction of four Justices, contended that "benign" uses of race (such as affirmative action when used to increase the number of minority students attending institutions of higher education) should be judicially reviewed under the 14th Amendment, applying a less exacting "intermediate" standard that can be met by demonstrating that a state's use of race was "substantially related" to an "important governmental interest," such as the redress of prior "societal discrimination." A second group of four more conservative Justices would not have reached the 14th Amendment issues in *Bakke* at all, urging instead that any race-conscious behavior violated Title VI of the Civil Rights Act of 1964.

Justice Powell wrote alone, though his judgment for the Court drew four votes from more liberal Justices on some positions and four votes from more conservative Justices on others. While every major facet of his opinion commanded five votes, no other single Justice agreed with his entire opinion. Justice Powell did reach the 14th Amendment issues in *Bakke*, and concluded that the state's use of race in admissions decisions required strict scrutiny by a federal court—proof that the racial considerations were "precisely tailored" to accomplish a "compelling" state interest. In addition, Justice Powell, joined by the four liberals, went on to hold that the "attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." 438 U.S.C. § 311-12. Nevertheless, he did not approve the particular use that UC Davis Medical School made of race during its admissions process, and reasoned that "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." In sum, Justice Powell's opinion held that while achieving student diversity in higher education is a compelling state interest sufficient to survive strict scrutiny by a federal court, and while race may constitutionally be used as a "plus" factor in admissions decisions, race may not be employed as the sole factor in determining admission for seats in an entering medical school class. 438 U.S.C. § 311-18.

[17] *See Hopwood v. Texas*, 78 Federal Reporter 3d 932 (5th Circuit), *cert. denied*, 518 U.S.C. § 1033 (1996) (holding that the use of racial considerations by the University of Texas Law School in making admission decisions violated the Equal Protection Clause); *Johnson v. Board of Regents of University of Georgia*, 263 Federal Reporter 3d 1234 (11th Circuit 2001) (holding that the University of Georgia's preferential treatment of nonwhite applicants violated the Equal Protection Clause); *Grutter v. Bollinger*, 137 Federal Supplement 2d 8212, 848 (rejecting educational diversity as a sufficiently compelling interest to justify race as one consideration in making law school admissions decisions) (E.D. Michigan 2001), *appeal pending*, 247 Federal Reporter 3d 821 (6th Circuit 2001) (granting stay pending the appeal).

[18] *Smith v. University of Washington Law School*, 233 Federal Reporter 3d 1188, 1201 (9th Circuit 2000) (holding that "educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures"), *cert. denied*, 121 Supreme Court Reporter 2192 (2001); *Gratz v. Bollinger*, 122 Federal Supplement 2d 811, 819021 (E.D. Michigan 2000) (upholding the use of racial considerations by the University of Michigan in making undergraduate admissions decisions), *appeal pending*.

[19] *Parents Involved in Community Schools v. Seattle School District No. 1*, 137 Federal Supplement 2d 1224, 1230 (W.D. Washington 2001).

[20] 347 U.S.C. § 483 (1954).

[21] 391 U.S.C. § 430 (1968).

[22] 402 U.S.C. § 1 (1971).

[23] *Green*, 391 U.S.C. § 437-38.

[24] *Id.* § 435.

[25] *Swann*, 402 U.S.C. § 22-31.

[26] Proper remediation in Charlotte-Mecklenburg, Chief Justice Burger wrote, would require an "[a]wareness of the racial composition of the whole school system;" a "limited use . . . of mathematical ratios [setting a 71% white, 29% black target for assignment of students to most Charlotte schools] was within the equitable remedial, discretion of the District Court." *Id.* § 25.

[27] *Id.* § 26.

[28] 402 U.S.C. § 43 (1971).

[29] *Id.* § 46.

[30] *Id.* § 45-46.

[31] *Id.*

[32] *See Keyes v. School District No. 1, Denver, Colorado*, 413 U.S.C. § 189, 208 (1973) (holding

that a districtwide school desegregation decree was warranted upon proof that a school board had administered its school statutes with the intent to create or maintain racially segregated schools in a substantial portion of the system); *Milliken v. Bradley*, 418 U.S.C. § 717, 744-45 (1974) (holding that a federal court lacked authority to order interdistrict school segregation in a metropolitan area absent proof that the district lines were drawn for racial reasons, or that the violations in one school district caused segregation in an adjacent district).

[33] 402 U.S.C. § 1 (1971).

[34] *Id.* § 16.

[35] *Bustop, Inc. v. Board of Education*, 439 U.S.C. § 1380, 1383 (1978).

[36] *Id.* § 1382-83.

[37] *Id.* § 1383.

[38] *Id.*

[39] *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S.C. § 189, 242 (1973) (Powell, J., concurring in part and dissenting in part).

[40] *Id.* (Powell, J., concurring in part and dissenting in part).

[41] *Id.*

[42] *See also Offermann v. Nitkowski*, 378 Federal Reporter 2d 22, 24 (2d Circuit 1967) (holding that a school district's voluntary use of race in making school assignments to end *de facto* segregation is constitutionally permissible when "its use is to insure against, rather than to promote deprivation of equal educational opportunity"); *Lee v. Nyquist*, 318 Federal Supplement 710 (W.D.N.Y. 1970), *aff'd without opinion*, 402 U.S.C. § 935 (1971) (holding that a New York State statutory provision that forbade state officials or appointed school boards from assigning students or from altering school attendance zones in order to improve racial balance was unconstitutional).

[43] *See Washington v. Seattle School District No. 1*, 458 U.S.C. § 457 (1982) ("*Washington*").

[44] *Id.*

[45] *Washington*, 458 U. S.C. § 474.

[46] *Id.* § 473.

[47] *Id.* § 474.

[48] A dissenting opinion in *Washington* by Justice Powell did not dispute the constitutional authority of the local board to engage in race-conscious student assignments, but instead focused on whether it was appropriate for federal courts to intrude on a dispute between the State of Washington and its local school boards over student assignment policies. *Washington*, 458 U.S.C. § 488–89.

[49] 438 U.S.C. § 265 (1978).

[50] *Id.* § 269–75.

[51] *Id.* § 299, 305.

[52] Although Justice Powell and four other members of the Court concluded that race may constitutionally be used as a "plus" factor in admissions decisions, Justice Powell additionally held that race may not be employed as the sole factor in determining admission for seats in an entering medical school class. Instead, he reasoned that "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.* § 311–12, 314.

[53] *Id.* § 316–18.

[54] For evidence that the *Bakke* principle was relied upon by colleges and universities, one need look no further than to former Presidents of Princeton and Harvard, see William G. Bowen and Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College*

and University Admissions, at 8 (1998) ("On of the authority of Justice Powell's decisive opinion in *Bakke*, virtually all selective colleges and professional schools have continued to consider race in admitting students"). *See also* Bernard Schwartz, *Behind Bakke: Affirmative Action and the Supreme Court*, at 154 ("A special committee appointed to analyze [New York University Law School's] admission policy in light of the *Bakke* decision reported that the policy should be guided by the Powell opinion.")

[55] 488 U.S.C. § 469 (1989).

[56] 515 U.S.C. § 200 (1995).

[57] 57 Federal Supplement 2d 228 (W.D. N. C. 1999), *aff'd en banc sub nom. Belk v. Charlotte-Mecklenburg Board of Education*, 269 Federal Reporter 3d 305 (4th Circuit 2001) (*en banc*).

[58] 269 Federal Reporter 3d 305 (4th Circuit 2001) (*en banc*).

[59] 57 Federal Supplement 2d 241.

[60] 488 U.S.C. § 469 (1989).

[61] *Croson*, 488 U.S.C. § 486. In *Croson*, the parties drew their battle lines over the meaning of a prior decision by the Supreme Court in Fullilove v. Klutznick, 448 U.S.C. § 448 (1980), which had recognized *congressional* authority to set aside a certain percentage of government construction contracts for minority contractors in order "to identify and redress the effects of society-wide discrimination." In her *Croson* opinion, Justice O'Connor explained that the latitude afforded to Congress by *Fullilove* had been dependent upon "the unique remedial powers of Congress under §5 of the Fourteenth Amendment." Because of its constitutionally authorized role "to enforce the dictates of the Fourteenth Amendment," Congress could use racial classifications to "identify and redress the effects of society-wide discrimination" under a more deferential standard of judicial review. In contrast, Justice O'Connor reasoned, "States and their subdivisions are [not] free to decide that such remedies are appropriate. Section 1 of the 14th Amendment is an explicit constraint on state power, and the *States must undertake any remedial efforts* in accordance with that provision." *Croson*, 488 U.S.C. § 488–90.

[62] *Id.* § 491–92; *see also id.* § 504. In this portion of her *Croson* opinion, only Chief Justice Rehnquist and Justice White join Justice O'Connor; elsewhere, she spoke for at least five members of the Court.

[63] *Id.* § 524 (Scalia, J., concurring in the judgment).

[64] *Id.* § 525 (Scalia, J., concurring in the judgment). Justice Scalia's sole authority for the "implicit" principle he attempted to identify was a single "*cf.*" citation to the Court's 1976 decision in *Pasadena City Board of Education v. Spangler*, 427 U.S.C. § 424 (1976) ("*Pasadena*"). Upon examination, however, *Pasadena* offers no support for Justice Scalia's position. Indeed, the case stands for the very different proposition that once a dual system has been completely disestablished, *federal courts* may not order further race-conscious relief. *Pasadena* says absolutely nothing about the latitude open to school boards that act voluntarily. *See Pasadena*, 427 U.S.C. § 433–35.

[65] *Croson*, 488 U.S.C. § 493 (emphasis added). In this portion of the opinion, Chief Justice Rehnquist and Justices White and Kennedy joined Justice O'Connor.

[66] To be sure, as Justice O'Connor was explaining the central purpose of the strict scrutiny standard — "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool" — she pointed out the "danger of stigmatic harm" that racial classifications often carry, and observed in passing that "[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority." 488 U.S.C. § 493. Although one circuit judge, writing in dissent, has characterized her remark as holding that racial classifications can never be justified except in a

remedial context, (*see Hunter ex rel. Brandt v. Regents of University of California*, 190 Federal Reporter 3d 1061, 1070 (9th Circuit 1999) (Beezer, J., dissenting)), other respected jurists such as Judge Richard Posner have expressly declined to read Justice O'Connor's remark in so categorical and sweeping a fashion, *see, e.g., Wittmer v. Peters*, 87 Federal Reporter 3d 916, 919 (7th Circuit 1996).

[67] 515 U.S.C. § 228.

[68] *Id.*

[69] *See id.* § 239 (Scalia, J., concurring in part and concurring in the judgment).

[70] *Id.* § 241 (Thomas, J., concurring in part and concurring in the judgment).

[71] *Croson*, 488 U.S.C. § 468, 512 (1989) (Stevens, J., concurring in part and concurring in the judgment); *see also Adarand*, 515 U.S.C. § 243 (Stevens, J., dissenting) (contending that benign race-conscious state actions should not be subjected to strict judicial scrutiny, since "[n]o sensible conception of the Government's constitutional obligation to 'govern impartially,' . . . should ignore [the] distinction" between "a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination").

[72] *Adarand*, 515 U.S.C. § 258 (Stevens, J., dissenting).

[73] *Croson*, 488 U.S.C. § 551-52 (Marshall, J., dissenting).

[74] *Id.* § 536-37 (Marshall, J., dissenting).

[75] *See Adarand*, 515 U.S.C. § 264-72 (Souter, J., dissenting); *id.* § 271-72 (Ginsburg, J., dissenting).

[76] After reviewing *Croson, Adarand*, and other pertinent authorities, Judge Richard Posner of the 6th Circuit concluded in 1996 that "[a] judge would be unreasonable to conclude that no other consideration except of history of discrimination" could warrant state use of race-conscious measures without first considering the specific circumstances that presented themselves to state policymakers. *Wittmer v. Peters*, 87 Federal Reporter 3d 916, 919 (6th Circuit 1996). Judge Posner expressly held that "the rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions." *Id.* § 919.

[77] The *Swann/Capacchione* court also cited a dissenting opinion by Justice O'Connor, joined by the Chief Justice and by Justices Scalia and Kennedy, in the case *Metro Broadcasting, Inc. v. FCC*, 497 U.S.C. § 547, 602 (1990) (O'Connor, J., dissenting), *overruled by Adarand*, 515 U.S.C. § 227 ("*Metro Broadcasting*"). The five-Justice majority in *Metro Broadcasting* upheld the promotion of "programming diversity" as a sufficiently important governmental end (under a lower standard of Equal Protection review deemed applicable to *federal* governmental decisions) to justify a racial/ethnic preference in the federal government's awarding or transferring of certain FCC-supervised broadcasting licenses. In dissent, Justice O'Connor subjected the FCC's justification of "broadcast diversity" to a withering analytical attack. The heart of her argument appears in the following quotation:

> *Modern equal protection doctrine has recognized only one [compelling governmental interest]: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications. The Court does not claim otherwise. Rather, it employs its novel standard and claims that this asserted interest need only be, and is "important" [under intermediate scrutiny review]. This conclusion twice compounds the Court's initial error of reducing its level of scrutiny of a racial classification. First, it* too casually *extends the justifications that might support racial classi-*

> *fication, beyond that of remedying past discriminations. . . . Second, it has initiated this departure by endorsing an insubstantial interest.*

497 U.S.C. § 613. It was almost certainly from this paragraph that the district court in *Swann/Capacchione* drew its generalization about the permissible range of "compelling governmental interests." Yet a close reading defeats the meaning that the court would ascribe to the passage. Justice O'Connor clearly was not speaking prescriptively here — to set the outer boundaries of compelling state interest law — but instead descriptively — to observe that *no previous decision* of the Court had recognized a nonremedial interest as compelling. Her descriptive use appeared even more clearly in her follow-up critique, in which she lamented that the Court had "too casually" extended the justification for a race-conscious action. What evidently distressed Justice O'Connor was that, by lowering the standard of review, the majority had gone into unfamiliar legal territory — approving a nonremedial justification for a racial classification — without the careful consideration that strict scrutiny entails.

Justice O'Connor's later insistence in *Adarand* that some additional compelling governmental interests do exist and might survive strict scrutiny made it unmistakable that neither she nor the other *Metro Broadcasting* dissenters (apart from Justice Scalia, of course) intended permanently to close the door on governmental interests that might justify race-conscious actions for other than remedial ends.

[78] 78 Federal 3d 932 (5th Circuit 1996).

[79] *Id.* § 944.

[80] Instead, the Court denied certiorari. *See Hopwood v. Texas*, 518 U.S.C. § 1033 (1996). Justice Ginsburg, joined by Justice Souter, wrote a brief opinion respecting the denial of certiorari, emphasizing that, while the use of race by public universities in their admissions decisions was "an issue of great national importance," *Hopwood* itself was not a good vehicle for Supreme Court review, since all parties conceded "that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional" and had "'long since been discontinued.'" *Id.* § 1034.

[81] Moreover, the *Swann/Capacchione* court failed to address earlier cases that pointed in the opposite direction. Among those were the following lower court decisions, all of which recognized some appropriate use of racial considerations in voluntary schooling contexts. *See Riddick v. School Board of Norfolk*, 784 Federal Reporter 2d 521 (4th Circuit 1986) (upholding authority of a unitary school board to take "white flight" into consideration and to adopt a plan relying upon neighborhood schools with the aim "to keep as many white students in public education as possible and so achieve a stably integrated school system"); *Parents Association of Andrew Jackson High School v. Ambach*, 598 Federal Reporter 2d 705, 717-21 (2d Circuit 1979) (holding that a race-conscious state student assignment plan, designed to minimize white flight from public schools, can survive strict scrutiny if it is narrowly tailored to attain the compelling end of promoting racially integrated public schools).

[82] *Croson*, 488 U.S.C. § 493.

[83] *Id.* § 493-94.

[84] *Id.* § 499.

[85] 38 Federal Reporter 3d 147 (4th Circuit 1994).

[86] 160 Federal Reporter 3d 790 (1st Circuit 1998).

[87] *Capacchione*, 57 Federal Supplement 2d 241 (quoting *Maryland Troopers Association v. Evans*, 993 Federal Reporter 2d 1072, 1976 (4th Circuit 1993)).

[88] *See, e.g., In re United States ex rel. Missouri State High School Activities Association*, 682

Federal Reporter 2d 147, 152 (8th Circuit 1982) (observing that "[s]tudents have no indefeasible right to associate through choice of school. Mandatory assignment to public schools based on place of residence or other factors is clearly permissible"); *Wharton v. Abbeville School District No. 60*, 608 Federal Supplement 70, 76 (D. S. C. 1984) (noting that plaintiffs in that school desegregation case had "presented no independent source, either in the law of South Carolina, or otherwise, which has granted to them a legitimate claim of entitlement to attend a particular school"); *Citizens Against Mandatory Bussing v. Palmason*, 495 P.2d 657, 663 (1972); *cf. Bronson v. Board of Education of City School District*, 550 Federal Supplement 941, 959 (S. D. Ohio 1982) (noting that "Ohio law . . . does not confer a right upon pupils to attend a specific school, even if they were previously assigned thereto"), *modified and aff'd on other grounds*, 525 Federal Reporter 2d 344 (6th Circuit 1975).

[89] As the Chief Judge of the 4th Circuit has noted, "[i]n drafting attendance plans, school boards have always been free to deny parental preference for any one of a hundred reasons . . . [O]nce a child is in a public school, the parent cannot dictate what teacher he gets, what courses he takes, what grades he receives, or what discipline he meets." J. Harvie Wilkinson, III, *From* Brown *to* Bakke: *The Supreme Court and School Integration*, at 109 (1979) ("Wilkinson").

[90] 160 Federal Reporter 3d 790 (1st Circuit 1998).

[91] *See Capacchione*, 57 Federal Supplement 2d 291-92.

[92] 160 Federal Reporter 3d 800.

[93] *See Comfort ex rel. Neumyer v. Lynn School Committee*, 100 Federal Supplement 2d 57, 65-68 (D. Massachusetts 2000) (distinguishing *Wessmann*); *Boston's Children First v. Boston*, 62 Federal Supplement 2d 247, 258-61 (D. Massachusetts 1999) (same).

[94] 195 Federal Reporter 3d 698 (4th Cir. 1999), *cert. dismissed*, 120 Supreme Court Reporter 1552 (2000).

[95] 197 Federal Reporter 3d 123 (4th Circuit 1999), *cert. denied*, 120 Supreme Court Reporter 1420 (2000).

[96] 480 U.S.C. § 149, 171 (1987).

[97] *Tuttle*, 195 Federal Reporter 3d 706 (quoting *Hayes*, 10 Federal Reporter 3d 16; *Paradise*, 480 U.S.C. § 171).

[98] *Id.* § 706 and note 11. In footnote 11, the panel recited the alternatives that had been mentioned by the school committee, but it made no independent assessment of their effectiveness in promoting diversity.

[99] *Paradise*, 480 U.S.C. § 172-73. Indeed, in *Paradise* itself, the Supreme Court rejected arguments by the State of Alabama that other proposed alternatives would suffice, finding them "inadequate because [they] failed to address" some of the compelling ends identified in the opinion.

[100] *Tuttle*, 195 Federal Reporter 3d 706.

[101] *Id.* (quoting *Croson*, 488 U.S.C. § 498).

[102] *See* Wilkinson at 304 (commenting with approval on Justice Powell's choice of diversity as the "most acceptable public rationale" in *Bakke*, contrasting its forward-looking perspective with remedial or compensatory rationales, and observing that at least in education, "the need for diversity will continue forever, as long as race matters to men").

[103] *Tuttle*, 195 Federal Reporter 3d 706; *see Eisenberg*, 197 Federal Reporter 3d 131-32.

[104] *See Tuttle*, 195 Federal Reporter 3d 707; *Eisenberg*, 197 Federal Reporter 3d 131-32, *citing Pasadena City Board of Education v. Spangler*, 427 U.S.C. § 424, 436 (1976) and *Freeman v. Pitts*, 503 U.S.C. § 467, 497-98 (1992).

[105] *Tuttle*, 195 Federal Reporter 3d 707.

[106] *Id.*

[107] *Comfort ex rel. Neumyer v. Lynn School Committee*, 100 Federal Supplement 2d 67. *See also Parents Involved in Community Schools v. Seattle School District No. 1*, 137 Federal Supplement 2d 1230-32 (distinguishing between more neutral "reshuffling" plans that do not confer any special benefit by race and "stacked deck" plans that specifically favor some racial groups in competitive applications).

[108] *Id.* at 707.

[109] *Id.*

[110] *See, generally*, Leroy J. Peterson *et al.*, *The Law and Public School Operation*, § 11.6, at 333-34 (1968) (stating that school boards are not required to assign a child "to the nearest school or the school most conveniently located," nor will a court "compel reassignment to the school selected by the parents"); 3 James A. Rapp, *Education Law*, § 8.02[8], at 8-64 (1999) ("There is no constitutional right to a particular placement. A student does not have a proprietary interest in where the student receives an education. Students do not have a right to . . . a particular school."); 1 William D. Valente, *Education Law: Public and Private*, § 9.2, at 138-39 (1985) ("The discretion vested in local school boards to assign students to particular schools is limited only by the rules against abuse of discretion and special circumstances. . . . Absent constitutional compulsion or state legislation that mandates neighborhood school assignments, students have no general right to be assigned to a neighborhood school.").

[111] *See, e.g.*, Janet W. Schofield, *Promoting Positive Peer Relations in Desegregated Schools, in Beyond Desegregation: The Politics of Quality in African American Schooling*, at 91, 93 (Mwalimu J. Shujaa, ed., 1996).

[112] Janet W. Schofield, "Review of Research on School Desegregation's Impact on Elementary and Secondary School Students," *in Handbook on Research on Multicultural Education* (James A. Banks and Cherry A. McGee Banks, eds., 1994)

[113] James E. Rosenbaum *et al.*, "Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?," *in Race, Poverty, and American Cities*, at 273, 300 (John Charles Boger and Judith Welch Wegner, eds., 1996).

[114] Amy Stuart Wells and Robert L. Crain, "Perpetuation Theory and the Long-Term Effects of School Desegregation," 64 *Review of Education Research* 531 (Winter, 1994); Marvin Dawkins *et al.*, "Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African American, Whites, and Hispanics," 31(2) *International Journal of Contemporary Sociology* 273 (1994); James M. McPartland and Jomills H. Braddock, II, "Going to College and Getting a Good Job: The Impact of Desegregation," *in Effective School Desegregation* (Willis D. Hawley, ed., 1981).

[115] Christopher Jencks and Meredith Phillips, "The Black-White Test Score Gap: An Introduction," *in The Black-White Test Score Gap*, at 1, 9, 26, 31 (Christopher Jencks and Meredith Phillips, eds., 1998); Rita Mahard and Robert L. Crain, "Research on Minority Achievement in Desegregated Schools," *in The Consequences of School Desegregation*, at 103-25 (Christine H. Rossell and Willis D. Hawley, eds., 1983).

[116] *Capacchione*, 57 Federal Supplement 2d 291.

[117] *Id.*

[118] *Capacchione*, 57 Federal Supplement 2d at 291.

[119] *Id.*

[120] *See Boston's Children First v. City of Boston*, 62 Federal Supplement 2d at 249 (noting that plaintiffs there seek not only to "eliminate the use of race as a factor in the assigning of

students to individual schools" but"challenge the way in which the [Boston School Committee has] divided up the school zones").

[121] The United States Department of Justice led or participated in many of the most wide-ranging Southern school desegregation cases. *See, e.g., United States v. Jefferson County Board of Education* 372 Federal Reporter 2d. 836 (5th Circuit 1966), *adopted en banc* 380 Federal Reporter 2d 385 (5th Circuit 1967) (requiring school districts throughout the six states of the old 5th Circuit — Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas — to begin immediate school desegregation); *Lee v. Macon County Board of Education*, 267 Federal Supplement 458, 460-61 (M.D. Alabama), *aff'd sub nom. Wallace v. United States*, 389 U.S.C. § 215 (1967) (requiring immediate steps toward statewide school desegregation in Alabama); *United States v. State of Georgia*, 19 Federal Reporter 3d 1388, 1390 (11th Circuit 1994) (noting that in 1969, the United States filed suit against the state of Georgia and 81 public school districts in the state, seeking school desegregation); *United States v. State of Texas*, 158 Federal Reporter 3d 299, 301 (5th Circuit 1998) (noting that since 1971 the Texas public education system has been governed by a federal court desegregation order). The DOJ has also played a major role in many Northern and Midwestern school cases. *See, e.g., Reed v. Rhodes*, 607 Federal Reporter 2d 714 (6th Circuit 1979) (Cleveland, Ohio); *Liddell v. Board of Education*, 667 Federal Reporter 2d 643 (8th Circuit 1981) (St. Louis); *Columbus Board of Education v. Penick*, 443 U.S.C. § 449 (1979) (*amicus curiae* in support of court-ordered desegregation of Columbus, Ohio, schools); *Dayton Board of Education v. Brinkman*, 443 U.S.C. § 526 (1979) (*amicus curiae* in support of court-ordered desegregation of Dayton, Ohio, schools); *United States v. Yonkers Board of Education*, 837 Federal Reporter 2d 1181 (2d Circuit 1989) (affirming school and housing desegregation orders in Yonkers, New York). According to Professor Parker, the Department of Justice was a party to school desegregation litigation in approximately 400 school districts as of 1997. Wendy Brown, "The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities," 50 *Hastings Law Journal* 475, 480 n. 16 (1999).

[122] *See, e.g. Eisenberg v. Montgomery County Board of Education*, 197 Federal Reporter 3d 123 (4th Circuit 1999) (*amicus curiae* in support of race-conscious student transfer plan); *Brewer v. West Irondequoit Central School District*, 212 Federal Reporter 3d 738 (2d Circuit 2000) (*amicus curiae* in support of inter-district, race-conscious school transfer program).

Chapter 6

Diversity in Higher Education: A Continuing Agenda

by Arthur L. Coleman[1]

Introduction

Affirmative action in higher education has seized center stage in recent years, with a plethora of federal court decisions regarding college and university admissions practices and the value of "diversity,"[2] as well as countless headlines that emphasize the politicization of the issue and the surrounding debate. The extremes of the political divide on this issue are as unwarranted as they are distracting. They distract the dialogue from a more meaningful and important conversation and agenda that could:

- Highlight the distinction between the largely indisputable value of diverse learning environments for all students and the means of achieving that diversity, which include race-conscious programs;
- Emphasize the need to explore and highlight various ways of achieving that diversity, including through race-neutral means; and
- Call attention to the critically important role of race in higher education financial aid decisions.

The U.S. Department of Education has played a central and balanced role with regard to affirmative action in higher education. Through its outreach, policy, technical assistance, research, enforcement, and advocacy-related activities, the Department has the potential to continue its balanced and strategic focus on this issue — one that is aligned with the educational interests and research related to the consideration of race or national origin in higher education. With a series of steps that reflect this alignment, the Department can continue to establish a position of reasoned leadership that rejects the polarity and the politics of the issue, just as it reinforces principles of educational soundness in its effort.

I. Highlight the Value and Importance of Diverse Learning Environments

Amid the debate about affirmative action, one of the frequently overlooked points that has generated relatively little dispute is the fact that a diverse learning environment generates positive benefits for all students from all walks of life.[3] In fact, the rapidly growing body of research on the subject confirms that there are teaching and learning, civic, and employment benefits (among others) that inure to students in higher education.[4] Diversity can improve teaching and learning, both inside and outside the classroom, by exposing students to multiple perspectives on a range of issues and by challenging their existing perspectives, thereby strengthening their critical thinking and problem solving skills. Diversity can also enhance students' civic values by bringing students together across lines of difference, real or perceived, and teaching students how to be good neighbors and citizens in our multicultural, democratic society. Finally, diversity can promote economic benefits by teaching students the value of diverse perspectives and how to function most effectively in diverse business environments and the expanding global marketplace.[5]

Notably, an increasingly strong voice in favor of pursuing strategies to promote campus diversity is that of corporate America. Supported by empirical evidence that "consistently" demonstrates that "more diverse work teams produce ideas and solutions that are more creative and of higher overall quality than homogenous groups,"[6] America's business community justifies the pursuit of higher education diversity as supporting both educational and business interests. In a report issued in January of 2002, for instance, the Business-Higher Education Forum emphasized the *economic* power of bringing different ideas and backgrounds to the table, particularly in a world in which global markets demand that employers focus on obtaining workers who "have studied and lived with people from a range of racial, ethnic, and cultural backgrounds [who] are better prepared to collaborate with colleagues around the globe, as well as to perceive and respond to world-wide business opportunities."[7]

With this foundation of broad-based support, the Department of Education should, in its policy pronouncements, public statements, and work with the Department of Justice related to possible amicus and case intervention decisions, ensure that the public record accurately captures the body of research on the subject and reflects the consensus view (even among those who might disagree about the means of achieving diversity) that diversity in higher education is of educational and economic importance to our institutions of higher education and to our national well-being.

II. Explore and Highlight Various Ways of Achieving That Diversity, Including Through Race-Neutral Means

Despite the broad-based support for diversity in higher education, race-conscious policies that have been designed to promote that goal have been under attack in recent years, both as to the question of whether the education-related diversity goals are "compelling" under federal constitutional standards, and irrespective of this issue, with regard to whether the means for obtaining the educational benefits of diversity are appropriately tailored to meet those goals. Again, the unnecessary politicization of the latter issue masks the opportunity for greater consensus. Given the benefits of diversity, not to mention the benefits of greater access for minority students, the focus should be on developing and supporting strategies that can achieve diversity while respecting to the fullest extent possible competing values. In part, this means "mending, not ending" affirmative action programs, and this should be clear. But it also means developing race-neutral strategies that can be successful over time, as well as strengthening the education pipeline. This implies a series of questions that should be a focus of research and related outreach efforts by the Department of Education:

- Are there race-neutral policies that can materially advance diversity interests in higher education?
- What are the ramifications of the use of these policies and how are diversity interests affected?
- What are the tradeoffs involved with respect to the multiple higher education admissions goals and related mission-driven objectives?

Frequently considered to be the third rail by affirmative action proponents, who categorically maintain that no race neutral program can under any circumstances replicate the "success" of race conscious programs, this issue has for too long been at the center of the political vortex.[5] As a result, an honest and straightforward effort to meaningfully evaluate the range of options that may be considered in the context of promoting diversity goals has been unnecessarily hampered.

The Department of Education could promote a comprehensive research agenda devoted to a series of studies in multiple higher education and K-16 contexts. By helping to lead this national conversation and examination, the Department would help put us on a track toward achieving our diversity goals while addressing competing values over time.

III. Acknowledge the Critical Role Financial Aid Plays in Students' Abilities to Pursue Higher Education Goals and the Important but Limited Impact of Race-Conscious Financial Aid in That Context

The current national debate regarding affirmative action in higher education has centered on the highly visible federal court actions that, with some exceptions, address race in admissions decisions.[9] While critically important for those selective institutions that consider race as part of the admissions process, the affirmative action issue in financial aid has significance — and potential impact — that extends beyond the question of admissions.[10] First, minority students are more likely to come from low-income families.[11] As a result, for most of these students, the availability of financial aid is a significant factor affecting their ability to go to college.[12] Second, at a time of increasing national diversity, and with the recognition that we can "leave no child behind," we face the prospect that by not providing the necessary financial aid supporting college and university attendance, college campuses "will be missing" 800,000 otherwise qualified minority students between now and 2015, with the commensurate impact of losses of billions of dollars to the national economy.[13] Finally, the indisputable fact is that race-conscious financial aid policies provide opportunities to tens of thousands of students each year who attend our nations institutions of higher education[14] — and it does so with less burden on non-beneficiaries than the consideration of race in higher education admissions decisions.[15]

Given the important and expansive role that financial aid plays with respect to providing opportunities for students to attend institutions of higher education, the issue of financial aid should be central in any discussion about affirmative action. The need to preserve a full range of programs and strategies to promote the educational interests reflected in diversity goals is thus closely associated with the need to ensure that college and universities do not in a time of increasing national diversity unduly restrict the aid that has made the difference for so many minority students in higher education.

The U.S. Department of Education should, therefore, take the necessary steps to affirm its long-standing policy of support for such scholarships, as it works to help institutions of higher education conform their practices to that policy. Importantly, with few exceptions, that policy document represents the work of two administrations—one Republican and one Democratic — in which the U.S. Department of Education closely examined the practice of race-conscious financial aid as well as governing legal principles as a foundation for its final policy guidance.

Following the December 10, 1991, publication of a notice of proposed policy guidance and request for public comment regarding race and national origin-conscious financial aid, and the subsequent study of the General Accounting Office (GAO) regarding such aid, the Department of Education issued final policy guidance on February 23, 1994, which (among other things):

- Acknowledged the GAO finding with regard to the relatively small percentage of such aid, when compared to all scholarships at institutions of higher education;[16]
- Concluded that financial aid was a minimally intrusive method for achieving student body diversity because of the limited impact of such aid on non-minority students; and
- Affirmed many of the principles set forth in the 1991 proposed policy and described in detail the legal foundations allowing for such aid.[17]

With respect to diversity interests, in particular, the 1994 policy recognized the possibility that colleges and universities could use race or national origin in situations other than those in which race or national origin was only a "plus" factor in awarding student aid.[18] Specifically, the Department recognized that such aid might be awarded "as a condition of eligibility . . . if it is narrowly tailored to promote diversity."

Framed in the context of a still operative legal framework, and grounded in a body of research and public commentary regarding the issue, the U.S. Department of Education's race-targeted scholarship policy is one that should continue to provide guidance to states and institutions of higher education, and serve as a basis for the Department of Education's outreach and technical assistance efforts with respect to issues of federal compliance.

IV. Conclusion

The policy and enforcement responsibilities of the U.S. Department of Education that relate to the issue of affirmative action must continue to be executed in a balanced way that affirms educationally sound policies and practices, and that is research-driven, nuanced, and reflective of stakeholder input. Principles of educational sufficiency lie at the heart of federal compliance determinations and ultimately depend on context-specific facts and analysis, rather than on rhetoric or hyperbole. To continue to carry the mantle of leadership on the important issue of race in education, the Department should affirm that fact, and act in ways that will ultimately expand opportunities for all of America's youth.

Endnotes

[1] Counsel with Nixon Peabody LLP in Washington, D.C., Mr. Coleman served as Deputy Assistant Secretary in the U.S. Department of Education Office for Civil Rights during the Clinton Administration, where he led the Department's outreach and technical assistance efforts related to affirmative action. He is the author of the College Board's recent publication, *Diversity in Higher Education: A Strategic Policy and Planning Manual* (2001).

[2] E.g., *Hopwood v. Texas*, 78 Federal Reporter 3d 932 (5th Circuit), *cert. denied*, 518 U.S.C. § 1033 (1996); *Smith v. University of Washington Law School*, 233 Federal Reporter 3d 1188 (9th Circuit 2000), *cert. denied*, 121 Supreme Court Reporter 2192 (2001); *Johnson v. Board of Regents of the University System of Georgia*, 106 Federal Supplement 2d 1362 (S.D. Georgia 2000), *aff'd*, 263 Federal Reporter 3d 1234 (11th Circuit 2001); *Gratz v. Bollinger*, 122 Federal Supplement 2d 811 (E.D. Michigan 2000); *Grutter v. Bollinger*, 2001 U.S. District Lexis 3256 (E.D. Michigan 2001).

[3] For example, the parties in the University of Michigan litigation in which admissions policies related to the undergraduate institution and the law school have been challenged do not debate the existence of educational benefits of a diverse learning environment. They dispute the claim that such benefits amount to a "compelling interest" under prevailing federal standards, and that the programs in question have been appropriately designed and implemented to achieve those goals. *See Gratz v. Bollinger*, 122 Federal Supplement 2d 811 (E.D. Michigan 2000); *Grutter v. Bollinger*, 2001 U.S. District Lexis 3256 (E.D. Michigan 2001). *See also Great Expectations: How the Public and Parents — White, African American, and Hispanic — View Higher Education*, at 13 (Public Agenda 2000).

[4] *See, e.g., Diversity Challenged: Evidence on the Impact of Affirmative Action* (Orfield and Kurlaender, eds., President and Fellows of Harvard College 2001) ("*Diversity Challenged*"); American Council on Education and American Association of University Professors, "Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms," <*http://www.aaup.org/divrep.pdf*>; Chang *et al., Compelling Interest: Examining the Evidence on Racial Dynamics in Higher Education* (The American Educational Research Association and the Stanford University Center for Comparative Studies in Race and Ethnicity 1999) ("*Compelling Interest*"). *See generally* Coleman, *Diversity in Higher Education: A Strategic Planning and Policy Guide* (The College Board 2001) ("*Diversity*") (providing a bibliographic summary of research related to the educational benefits of diversity produced by the U.S. Department of Education in November of 2000); Expert Report of Patricia Gurin in *Gratz v. Bollinger* and in *Grutter v. Bollinger*.

[5] Palmer, "A Policy Framework for Reconceptualizing the Legal Debate Concerning Affirmative Action in Higher Education," *in Diversity Challenged. See also Compelling Interest; Diversity.*

[6] *Crossing the Great Divide: Can We Achieve Equity When Generation Y Goes to College?*, at 39 ("*Crossing the Great Divide*").

[7] *Investing in People: Developing All of America's Talent on Campus and in the Workplace*, at 35 (Business and Higher Education Forum 2002). *See also* Amicus Brief of General Motors Corporation in *Grutter v. Bollinger*, at 1 (concluding that "the future of American business and, in some measure, of the American economy depends upon [racially and ethnically diverse student bodies]").

[8] *See*, for example, the U.S. Commission on Civil Rights Report (Apr. 11, 2000) and Dissenting Statement regarding various state percentage plans, which address the elimination of affirmative action in Texas and California and the subsequent enactment of "race neutral" policies designed to promote a more diverse student population in higher education. In Texas, following *Hopwood v. Texas*, 78 Federal Report 3d 932 (5th Circuit), *cert. denied*, 518 U.S.C. § 1033 (1996), which prohibited the use of race in admissions decisions, the state established a new set of admissions criteria known as the "10 percent plan," pursuant to which students graduating in the top 10% of their high school classes would be guaranteed admission to any state institution of higher education. In California, following the elimination of affirmative action, the state guarantees college admission to any student ranked in the top 4% of his or her high school class, but unlike the Texas plan, the California plan does not guarantee a student admission to the institution of his or her choice; it guarantees admission only to one of the University of California campuses.

[9] *See supra* n. 2. Compare *Condit v. State of Oklahoma*, CIV-99-2106-W (Western District of Oklahoma) (involving challenge to a statewide scholarship program involving, among other things, scholarships related to the National Achievement Scholars Program and the National Hispanic Scholars Program).

[10] *See, e.g.*, Thomas J. Kane, "Misconceptions in the Debate over Affirmative Action in College Admissions," *Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives*, at 28 (Orfield and Miller, eds., President and Fellows of Harvard College 1998) ("While the extent of affirmative action seems to be significant at elite schools, there is little evidence of race-based admissions policies at the institutions that enroll 80 percent of four-year college students").

[11] *Money Matters* (American Council on Education 1999).

[12] Terenzini *et al.*, *Swimming Against the Tide: The Poor in American Higher Education* (The College Board 2001); *see also* Carnevale and Fry, *Crossing the Great Divide*, at 29 (ETS 2000) (college enrollment is "sensitive to tuition and fee costs," and the "correlation between cost and attendance is especially true for low-income youth").

[13] *Id.*

[14] 56 Federal Register 64,548 (1991) (citing an American Council on Education study finding that 45,000 minority students at four-year colleges received "race-exclusive scholarships" — "scholarships for which students of *only* a designated race or national origin may compete").

[15] 59 Federal Register 8756 (1994).

[16] The General Accounting Office concluded that "many schools" used minority-targeted scholarships "to some extent" but that those scholarships "were a small proportion of all scholarships" awarded. It determined that despite the "widespread use" of such scholarships, they accounted "for a small share of all scholarships and scholarship dollars," representing "no

more than 5 percent of all undergraduate and graduate scholarships and scholarship dollars. . . . [and] 10 percent of all [professional school] scholarships and 14 percent of scholarship dollars."

[17] The issuance of the 1991 proposed policy and the subsequent final policy in 1994 followed a turn of events at the Department of Education, where, between 1990 and 1991, Secretary of Education Lamar Alexander reversed his Assistant Secretary for Civil Rights, who had declared that Title VI categorically prohibited the award of scholarships on the basis of race. Secretary Alexander affirmed that the Department would "continue to interpret Title VI as permitting federally funded institutions to provide minority scholarships." *Washington Legal Foundation v. Alexander*, 984 Federal Reporter 2d 483, 485 (D.C. Circuit 1985). The 1991 proposed policy guidance, providing for the first time in the Department's history a "clear set of principles" based on a "full policy review" surrounding the use of race-conscious scholarships, 56 Federal Register 64,548 (1991), explained that the Department planned to interpret Title VI "as permitting race-based scholarships in a variety of instances." Alexander, 984 Federal Reporter 2d 485.

[18] 59 Federal Register 8761.

Chapter 7

Urban Fragmentation as a Barrier to Equal Opportunity

by john a. powell and Kathleen M. Graham[1]

Introduction

This chapter describes an important problem that has received almost no attention as a civil rights issue — the fact that our American cities have sprawled into thousands of autonomous and homogenous self-interested suburbs. Why is this a civil rights issue? There are two powerful reasons why this is one of the most important civil rights issues of the new millenium. One is the impact of the phenomenon and the other is its genesis. Despite many gains in our society, we remain frustrated with persistent segregation in our housing market, the deterioration and economic and racial segregation of our schools, racial discrimination in our workplaces and racial segregation of the job market, and a visible disparity in both tax base and demand for municipal services between some wealthy suburbs and stressed older cities. These problems are often interrelated and they are a direct consequence of the growth of sprawling and fragmented metropolitan areas. The genesis of this phenomenon is rooted in two historical dynamics — the federally subsidized movement of the largely white middle class from city to suburb and the state-authorized establishment of thousands of individual autonomous governments in those suburbs. These two dynamics have left the majority of African Americans living in urban areas characterized by racial segregation and concentrated poverty.[2] These physical circumstances limit the reach of many civil rights efforts and present a major obstacle to the considerable work of securing the civil rights described elsewhere in this report.

The demographics are well known — a highly disproportionate number of African Americans live in those central urban areas that are most isolated from economic resources, educational and social opportunities, and political power, while most whites have moved, with those resources and opportunities, to the suburbs. This racialization of residential space over the last 50 years was no accident. The federal government played a key role in paving the way for the majority of white metropolitan residents to migrate out of the nation's central cities while simultaneously denying to African Americans living in urban communities significant available resources that could have fostered the healthy development of those communities. The result is the physical distancing of the economic and social resources required for African American citizens and communities to thrive. Those resources now reside in inaccessible and autonomous enclaves outside the city, where concentrated poverty renders the goals of civil rights legislation unattainable.

Importantly, the states have granted to local municipal authorities autonomy in establishing boundaries, land use policies, taxation, education, and the provision of other services. The result has been the proliferation of thousands of suburban municipal jurisdictions, each seeking to create and attract a valuable tax base while simultaneously externalizing expensive social costs and excluding people of color. In other words, the federal subsidy to move, combined with the local power to exclude, drew white people and opportunity from the city while walling in people of color with constantly diminishing resources.

This altered geopolitical landscape, resulting from the fragmentation of local government function into thousands of self-interested jurisdictions, remains unnamed and unrecognized as the most significant obstacle to the achievement of full civil rights for African Americans. The enforcement of laws, policies, and regulations that are designed to ensure equal opportunities in employment, housing, education, and public accommodation is not possible when those opportunities are located far from the residential spaces occupied by the laws' intended beneficiaries. Moreover, the right to vote, or to hold office, is diminished when the electoral gain provides purview over a disinvested economy, crumbling housing stock, sinking tax base, inferior schools, and high but unmet demand for social services.

Below we document the federal government's central role in creating racialized space and concentrated poverty among African Americans. Without minimizing the difficulty presented by the autonomy of multiple local authorities, there is much the federal government can do within existing and proposed laws and programs to open access for African Americans to the opportunities from which they have been excluded. But the government also needs to work together with civil rights advocates, beginning now, to develop a more comprehensive strategy to counterbalance the localized self-interested nature of our fragmented metropolitan areas.

I. The History of Sprawl and Concentrated Poverty

A. The American Metropolis Is Highly Geopolitically Fragmented

The emerging literature of urban growth describes the vast physical sprawl and stunning demographic transformation of urban spaces over the last 50 years.[3] People moved from city to suburb in extraordinary numbers, with the result that most metropolitan whites live in suburbs and most African Americans live in city centers. To understand the obstacle that this urban history presents to the achievement of civil rights goals, it is necessary to examine that history thoughtfully, beginning with two simple dynamics repeatedly described by researchers: first, there has been a constant population migration from the "old" city centers to a second, then third, then fourth generation of "metro cores" at the ever-growing urban periphery; and, secondly, the resulting sprawled population has organized itself into literally thousands of self-determined local governmental units.[4] For purposes of this chapter, the term "city" refers to the central cities and "suburb" to those areas outside the city to which the population has moved since 1950, granting that respective suburbs, or layers of suburbs, may be quite different from each other.[5]

In 1950, 56% of the nation's population lived in the 168 areas identified as metropolitan by the national census;[6] 60% of these metropolitan residents lived in the old central cities.[7] The dominance of the city in the metropolitan region and the presence of city-based public institutions produced a sense of regional identity and unity, despite the heterogeneity of the metropolitan population.

By 1990, 66% of the nation's population lived in the same 168 metropolitan areas, but two-thirds of that population now lived outside the central city, shrinking the urban representation of the population to one-third in these metropolitan areas. Additionally, 152 new metropolitan areas had been created by four decades of "new" urban growth, with the result that three-quarters of the American public lived in 320 metropolitan areas, most outside the city centers.[8]

The function of governing the population of these metropolitan areas became highly, indeed stunningly, fragmented. In 1950, 60% of the 168 census-defined metropolitan areas' population lived within 193 municipal organizations; by 1990, 70% of those living in those same 168 metropolitan areas "fell under the governance of approximately 9600 suburban cities, towns, villages, townships and counties."[9] Stated another way, in 1942 there were approximately 24,500 municipalities and special districts in the United States; by 1992 that number had more than doubled to 50,834.[10]

B. The Fragmented Metropolis Is Economically and Racially Segregated

As the population moved outside existing city centers, frequently facilitated by the activities of real estate developers or manufacturers, citizens sought municipal incorporation in order to control their tax burden and define the character of their neighborhoods.[11] The reliance on local property taxes to fund services placed development of a strong tax base at a premium and created simultaneous pressure to limit density.[12] While many new suburban jurisdictions were thus fiscally motivated to use exclusionary zoning and development policies, to garner assets while controlling expenses, the rush to the periphery was also significantly motivated by explicit racial discrimination.[13] One researcher found that the desire for racial exclusion was a stronger force driving incorporation of new governments in the 1950s and 1960s than the desire for better services and lower taxes.[14]

In 1990, 33% of white metropolitan residents lived in central cities, whereas 67.8% of African American metropolitan residents lived in central cities. Economic segregation not only parallels this racial segregation but is seen as increasing in intensity with the proliferation of the suburbs. For example, "areas of poverty" are those where 20% or more of the residents have incomes below the federal poverty level. Three of four poor urban African Americans lived in such areas in 1990.[15] "Concentrated poverty" exists where 40% or more of the residents have incomes below the federal poverty level; and in the cities, 1 in 3 poor African Americans lives in a neighborhood of concentrated poverty, compared with 1 in 20 poor whites. Moreover, between 1970 and 1990 the number of concentrated poverty census tracts more than doubled, and the number of people living in such tracts nearly doubled, while the overall population increased by only 22%. By 1990 over half of the nearly eight million Americans living in concentrated poverty were African American, and a quarter were Hispanic.[16]

Four decades of migration from city to suburb have resulted in the proliferation of more and more densely populated areas of poverty and concentrated poverty within the city, disproportionately inhabited by poor people of color, particularly African Americans. The suburbanization of America is thus inextricably tied to the creation and expansion of the ghetto, barrio, and slum.[17] Those who live in these urban areas are completely isolated from the structures of opportunity located in many suburbs.

In the 1970s and 1980s some African Americans did move to the suburbs, and in some Southern cities rural African Americans became suburbanites as the metropolitan area grew around them. A closer look at these "black suburbs," however, reveals that many are older cities in decline themselves, with relatively low socioeconomic status and high population density.[18] Further, moving to the suburbs has not meant that African Americans are integrated into the white metropolitan population. Suburbs where African Americans have settled reflect rates of segregation and isolation almost as high as those of their respective city centers.[19] For the most part, suburban opportunity structures continue to evade suburban African Americans.

Even suburbs that have attracted middle-class African Americans and bear a semblance of economic stability risk economic meltdown. For example, Prince George's County, Maryland, has been touted as "the highest per-capita income, majority black jurisdiction in the United States."[20] In fact, this suburb is experiencing a decline in property values, an increase in child poverty, more numerous incidents of crime, lower standardized test results, and an increase in the population of low-income students.[21] A recent analysis revealed that the county's proximity and openness to neighborhoods populated by low-income African American families, its inability to attract new jobs, and its failure to capture other new economic growth create an impending crisis.[22] The hope that African Americans would find opportunity in the suburbs has been undermined because the new residential spaces are as fragmented and as segregated as the old.

C. The Racialization of Impoverished Urban Space and the Fragmentation of City Government Are the Result of Federal Programs and Policies and State and Local Law

1. The Federal Role

Both the population migration from city to suburb and the exclusion of African Americans from that migration are directly attributable to federal programs and policies. Neither market forces nor aggregated private choices played as significant a role as did the federal government, augmented by state and local law and policy.[23] As noted above, through the middle of the 20th century most metropolitan residents lived in the city centers, where they frequently sorted themselves by class and race, with recognizable wealthier neighborhoods and racially segregated communities.[24] Beginning, however, with the National Housing Act of 1934, which created the Federal Housing Administration (FHA), the federal government created the incentive to move out of the city and subsidized the move of whites to the suburbs.[25] The FHA both subsidized mortgages and insured private mortgages, creating terms of suburban home ownership that were frequently less expensive than renting.[26]

On its face the federal mandate to stabilize and expand home ownership favored the new single-family housing in the suburbs, which had proportionately lower quantities of rental housing than found in the central cities. More importantly, both the FHA and its predecessor Home Ownership Loan Corporation (HOLC) incorporated explicit racial criteria in their own programs and in the home appraisal standards established for their vast and critical support of private mortgages. Indeed, "(f)ederally subsidized mortgages often *required* that property owners incorporate (racially) restrictive covenants into their deeds."[27]

The FHA would insure mortgages (and by the 1950s the FHA and Veterans Administration (VA) were insuring half the mortgages in America) only in "racially homogenous" neighborhoods.[28] The agency's underwriting manual required areas to be investigated "to determine whether incompatible racial or social groups are present, for the purpose of making a prediction regarding the probability of the location being invaded by those groups. . ."[29] People of color were literally classified as nuisances, to be avoided along with "stables" and "pig pens."[30] HOLC and the FHA created four categories of neighborhood value, with homogenous white neighborhoods in the most valued category, and neighborhoods housing people of color, even in miniscule representation, relegated to the least desirable category.[31] The FHA urged developers, bankers, and local government to use zoning ordinances and physical barriers to protect homogeneity, and racially restrictive covenants were a precondition of mortgage insurance. "The FHA Insurance Manual used in the thirties and forties 'read like a chapter of the Nuremberg Laws.'"[32]

These HOLC-FHA policies, augmented by the Servicemen's Readjustment Act of 1944, which ensured that returning veterans could buy their own homes through cheap VA loans, set the stage for the post-World War II suburban boom — the white migration to new single-family homes in spaces *away from* the city centers.[33] Simultaneously, the federal government was withholding mortgages, and mortgage insurance, from those properties relegated to the undesirable appraisal categories, i.e., from integrated and minority neighborhoods and older housing stock. The federal government was thus responsible for its own as well as the insurance and banking industries' disinvestment in the housing stock of many central city neighborhoods — *and all on explicitly racial terms.*

Other substantial federal financial support that expanded and reinforced the settlement of the suburbs includes the creation of the secondary mortgage market, whose government-sponsored entities (GSEs) raised billions of dollars, beginning in the late 1960s, to be used by private frontline mortgage lenders. While civil rights and consumer advocates succeeded in preventing the Federal National Mortgage Association (FNMA) from adopting policies that sanctioned redlining, many discriminatory practices were already entrenched.[34] Thus, the GSE money poured into suburban housing and Congress did not require GSEs to direct a designated share of funds to mortgages for city center homeowners until the early 1990s.[35]

The federal government did turn its attention to the demise of urban centers when Congress appropriated funds for "urban renewal." These programs channeled $13.5 billion to cities for urban redevelopment between 1953 and 1986. The end result for many city residents was displacement from their poor but viable neighborhoods to high-density, high-rise public housing in isolated sections of the city. Urban renewal became synonymous with "Negro removal," frequently to "black holes of high crime and poverty."[36] Public housing that was intended to be temporary became permanent.[37] The unattractive downtown commercial buildings, parking ramps, and public housing complexes funded by federal money hastened the exodus of the middle class and private investment to safer, cheaper territory.[38] Urban hopes were again raised by the federally funded Model Cities program of the 1960s, when plans were made to transform inner-city neighborhoods by linking residential rehabilitation to massive investment in education, job training, health care, all based on community input. However, funding for implementation did not materialize and the program became a model of raised, and dashed, expectations.[39]

In addition to subsidizing homes in the suburbs for whites, the federal government built and paved the roads that would carry the urban population away from the city center. Conceived and enacted in the 1950s, the interstate highway system, eventually 54,714 miles of pavement, was originally designed to emphasize long-distance interstate roads. Regardless, by the mid-1990s over half the $652 billion in highway aid (in 1996 dollars) had been spent to construct 22,134 miles of new highways *within* metropolitan areas.[40] These highways invariably run from city center to suburb, or suburb to suburb, allowing white suburbanites the freedom to live at greater distances from their workplaces and making it easy and advantageous for businesses to relocate to suburbs with attractive tax advantages.[41] Highways were even designed and located to divide the city along racial and ethnic lines, heightening the isolation of urban minorities.[42]

No such investment in public transportation, which would best serve residents of the city center, occurred. Contrast the magnitude of the investment in federal highway dollars with the relatively modest aggregate of $85 billion (in 1996 dollars) in federal aid spent pursuant to 1964's urban mass transit legislation.[43] Since many African American central city households are without a car — in Philadelphia and Boston, roughly 50%; in New York about 70% do not have access to a car — public transportation is critical to these central city residents, to reach increasingly distant job sites.[44]

The decentralization of transportation funding effectuated by the block grants of the 1980s has seen precious mass transit dollars spent to assist commuters from distant suburbs train to the financial city centers while leaving thousands of city center residents, who are disproportionately without access to cars, standing on city streets waiting for overcrowded buses.[45] Even in the 1990s, when certain federal highway funds were available on a flexible basis for states and regional localities to transfer from highway programs to public transit projects, only $4.2 billion of the $33.8 billion available, or 12.5%, was actually transferred.[46]

Life in the sprawling suburbs is dependent on the automobile, and the automobile on gasoline. A leading commercial real estate advisor emphasizes that the real estate industry has standardized suburban development in a way that creates distance, both within the suburb and away from the city. Suburbs are characterized by the spatial separation of places for shopping, working, playing, and living, and income-producing property is dependent on visibility from a highway and accessibility by car.[47] Cars are required to negotiate this space, and cars require more square footage than do the cars' owners, resulting in buildings "stranded in the middle of vast asphalt parking lots[.]"[48] The paramount importance of the automobile to suburban life is, again, supported by federal tax policy. Due to modest gasoline taxes Americans pay one-half to one-third the price per gallon of gas paid in European countries.[49] It is U.S. national policy to promote cheap gasoline and in the process subsidize the massive use of the private automobile essential to suburban life.[50]

Finally, federal grants have historically subsidized new suburban development by providing billions of dollars to state and local governments for new sewage treatment plants, much of the money used to provide new capacity for suburban growth rather than to rectify problems or improve existing wastewater systems.[51]

Over time the federal programs and policies described in this section have been revised to remove racially explicit criteria.

However, the policies and programs themselves continue. There has been no effort to quantify the magnitude of the opportunities lost by those individuals and communities who were excluded from significant federal benefits, or to ascertain the ongoing effects of these programs and policies on those individuals and communities previously excluded.

2. The Role of State and Local Government

As noted above, the migration of metropolitan residents away from city centers was paralleled by the incorporation of thousands of economically self-interested suburban entities, fragmenting the function of governing the metropolis. States delegated to individual municipalities the power to incorporate, tax, spend tax revenues exclusively on those who live within the municipal boundaries, and, critically, to control their respective land use, primarily through the zoning power but also through condemnation, financial incentives, and municipal borrowing.[52]

The autonomy exercised by the suburbs, particularly in zoning restrictions, is frequently but wrongly assumed to be a bedrock principle of democracy. In fact, local governments have no claim to exercise control over their incorporated space, except by state delegation of that authority. Indeed, the federal government played a significant role in spreading the idea of locally controlled zoning throughout the nation. In 1923 then-Secretary of Commerce Herbert Hoover authorized the drafting and widespread circulation of the Standard State Zoning Enabling Act, following New York State's enactment of a similar provision. Within a few years more than half the states had adopted the federal model, and today virtually every metropolitan area has autonomous zoning authority.[53] The importance that this authority to create and maintain boundaries has had on the development of American cities cannot be underestimated.[54]

An early federal court decision declaring zoning laws unconstitutional described exactly the intended result of such laws: "to classify the population and segregate them according to their income or situation in life."[55] And segregate they did, economically but particularly by race. Suburbs initially drafted zoning ordinances and deed covenants with explicit racial exclusions, from the 1920s until they were declared illegal in the late 1940s. They then substituted and continue to use exclusionary zoning in the form of restrictions on multifamily housing and publicly financed projects, and minimum acreage requirements for the construction of single family homes.[56] Whether facially neutral exclusionary zoning was even necessary to maintain segregation is questionable, as racialized fragmented space will perpetuate itself even without further racist action.[57]

The autonomy granted to local governments in land use and related issues allowed both racial and economic incentives to operate to exclude the poor, people of color, and particularly African Americans. In several important rulings the United States Supreme Court condoned and sanctioned this exercise of local autonomy. The Court held that it is constitutional for suburbs to use exclusionary zoning ordinances that have demonstrable racial effects, absent clear evidence of overt race-based animus; and to grant other preferences to residents over nonresidents, also despite disparate racial effects.[58]

The Court's sanction of local autonomy in the area of education is among the most problematic for the advancement of the civil rights of African Americans. In *Milliken v. Bradley*, the Court found that cross-district desegregation measures could not be ordered unless it was shown that all districts involved, in addition to the state, had engaged in intentionally segregative practices.[59] While this decision did not completely rule out metropolitan-wide desegregation efforts, it set a high standard of proof that has rarely been met.[60] The Court did not consider the historical motivation for those boundaries, or that it is the state, not the respective municipalities, that is the source of governmental authority for the delegated powers at issue.[61] Either analysis would have supported an interjurisdictional remedy. Similarly, the Court has ruled that school financing can legitimately be limited to the local tax base, regardless of the arbitrary and unequal results.[62]

The Supreme Court has repeatedly ruled that there is no remedy where segregation occurs interjurisdictionally rather than within a given jurisdiction. Interjurisdictional segregation is almost always the case, as suburbs have had free reign to attract and exclude residents and businesses consistent with their economic and racial preferences.[63] Moreover, the Court requires that those who challenge municipal action prove overt racially invidious intent.[64] This evidentiary requirement presents an insurmountable obstacle when the discrimination consists of facially neutral policies designed to maintain the existing homogeneity of previously segregated space.

The Supreme Court has thus granted the principle of local autonomy constitutional status. It has examined, and legitimated, the fragmentation of metropolitan governance described above. It has legalized a process that contributes significantly to the continuing intense segregation of African Americans in the inner city and to the location of opportunities in distant places.[65]

D. Fragmentation Begets Homogeneity, Which Contributes to Structural Racial Inequality and Hostility Toward the Poor and People of Color in Particular

The new political jurisdictions created by the migration to the suburbs are more homogenous racially and economically than the cities from which these residents came.[66] The greater the fragmentation in a metropolitan area the greater the observed economic and racial segregation.[67] Geographic borders make racial and economic distinctions readily apparent, and the urban population has accordingly organized itself into cities segregated by race, educational achievement, and occupation.[68] This high level of homogeneity has several consequences.

First, African Americans who remain in urban centers of concentrated poverty remain segregated from opportunity. The migration to the suburbs included not only people but resources. Employment has moved to the periphery and, at least one researcher would argue, to a select "favored quarter" of the periphery.[69] Thus, in the Chicago metropolitan region, from 1980 to 1990 the "favored quarter" of the far northwestern suburbs garnered 458,000 new jobs, virtually the entire increase for that region.[70] At the same time Chicago itself lost about 90,000 jobs, the same number gained by suburbs outside the favored quarter.[71] One veteran urban researcher and analyst reports that 80% of all job creation in recent decades has occurred in the suburbs.[72] Between 1970 and 1990 the percentage of the nation's offices located in the suburbs grew from 25% to 60%.[73] At the same time central cities were losing their traditional manufacturing jobs. The total proportion of metropolitan manufacturing jobs located in central cities fell from 63.3% in 1950 to 46.2%

in 1980, and has continued to fall to the present.[74] In the 20-year period from 1967 to 1987 New York and Detroit each lost more than 50% of their manufacturing jobs (520,000 and 108,000 respectively), and Philadelphia and Chicago each lost more than 60% (160,000 and 326,000 respectively).[75]

Jobs moved away from central cities in large absolute numbers at the same time that job creation in at least some suburbs soared. This happened at the very same time that the number of people living in concentrated poverty in the central cities nearly doubled. The limited housing options physically proximate to employment opportunities coupled with lack of transportation (both situations fueled by federal policy) preclude city residents from securing employment.

Concentrated unemployment affects all levels of social organization — including those necessary for effective participation in democratic government and civil society. The prevalence and strength of social networks, the extent of collective supervision and personal responsibility communities assume in addressing their problems, and the participation in formal or voluntary organizations are all affected by unemployment.[76]

Other effects of concentrated poverty include poor school performance, higher dropout and teen pregnancy rates, family instability, and dramatic increases in crime.[77] While white flight to the suburbs and the exclusionary policies of the fragmented governments there created the increased concentrations of poverty in the city centers, the residents of those centers are frequently blamed themselves for the bleak consequences of being left to live in diminished circumstances.

A second insidious consequence of the division of metropolitan areas along racially homogenous lines is the creation of intensified feelings of suspicion and fear. "Metropolitan areas are not simply divided between black and white and rich and poor. Suburb after suburb and neighborhood after neighborhood are organized in terms of a multitude of 'we' feelings, each of which defines itself in opposition to outsiders."[78] Other commentators on the dynamics of urban growth recognize that the economic and racial segregation reflected in the fragmentation of metropolitan areas reduces the capacity of citizens to empathize with the "other."[79] The fear of African American ghettos and the complex of social problems often associated with the poverty found there fueled, and was at times the primary cause for, white and middle class flight from city centers.[80]

This increased aversion to all strangers, particularly those associated with complex and expensive social problems, combined with the decentralized power of local jurisdictions, decreases the prospects for a political solution to the problems of fragmented sprawl and concentrated poverty.

Gentrification is sometimes heralded as an antidote to the problems of inner-city neighborhoods, as it frequently involves middle and upper-middle-class whites returning to rehabilitate the housing stock in declining urban neighborhoods. Commercial development may follow, to provide services to a stable or affluent population. And, arguably, diversity should increase and homogeneity decrease. However, when gentrification does occur, the poor whose neighborhoods are being "improved" are forced to move to other areas of concentrated poverty within the city or, where affluent cities like San Francisco or Boston are concerned, to poor areas outside the city.[81] The poor, frequently African Americans, again find themselves in spaces physically distant from newly created opportunities.[82]

Revitalization of a city is not the same as gentrification, it should be made clear, because it does not necessarily entail displacement of low-income people of color. Indeed, many cities with large low-income populations greatly benefit from revitalization. The federal government should encourage the development of mixed-income and racially stable neighborhoods, but work to prevent displacement at the neighborhood, city, and even regional levels.

II. Regional Efforts to Address Sprawl and Concentrated Poverty

There have been some efforts to regionalize decision-making in metropolitan areas, a logical response to problems that transcend individual municipal boundaries. Most reformers accept that a move to metropolitan-wide government is unrealistic, for several reasons.[83] Most suburban jurisdictions are not interested in sharing the increased fiscal burden associated with regional government and, as described above, not only fear the communities of color associated with inner cities but also feel disassociated from those in other, economically differentiated suburbs.

There is also a well-founded concern on the part of African Americans that hard-won political power would be diluted in a move to regional decision-making. "Many inner-city communities of color have resisted regional strategies for fear of losing cultural control, cultural identity, and political power within their communities."[84] In Indianapolis, for example, the regional "Uni-Gov" has diluted the political power of communities of color in the central city by uniting the Democratic presence in the city with surrounding Republican areas. Schools, police and fire departments, and significant welfare costs, however, remain local responsibility. This particular example of selective regionalism diluted the growing political power of African Americans in the urban core while leaving them without access to the resources of the greater metro area.[85]

Several other urban theorists would oppose regionalization in the belief that small communities foster desirable attributes — citizen participation, government responsiveness, cultural pride, and a sense of belonging.[86]

Despite these reasons for resistance to regional cooperation, the fact remains that sprawl and concentrated poverty cannot be solved at the local level. As a result there are a growing number of instances where some form of limited-purpose regional government and tax sharing is underway. These efforts vary with the metropolitan context.

For example, in Minnesota a state legislator who represents part of Minneapolis has used maps reflecting extensive census and fiscal data to demonstrate to the representatives of older, inner ring suburbs that they share the plight of the central city in subsidizing the infrastructure and development of the newer suburbs. The older suburbs are in fact in decline themselves, with aging infrastructures and housing stock and declining tax base. Regional alliances among older suburbs and urban centers can seek mutually beneficial allocation of resources and resist the flow of benefits to the newest suburbs. One researcher points out that only 15 to 30% of the population lives in these "favored quarters," although they garner a disproportionate amount of the resources and contribute little if anything to the metropolitan area that has subsidized their infrastructure. Thus older suburbs, which initially zoned to keep the poor and people of color out, might voluntarily, out of self-interest, ally themselves for limited purposes with the urban core.[87]

These voluntary alliances that grow out of grass roots efforts represent one approach to addressing sprawl and poverty. Another would encourage states to withdraw some of the autonomy granted to local governments, mandating regional solutions in the face of local intransigence. This is what happened in Atlanta. Traffic congestion created by fragmented sprawl and lack of regional planning resulted in ozone levels that disqualified the region from receiving federal highway funds. The legislature stepped in, to create a regional transportation authority, with broad powers to shape transit, restrict development throughout the area, and sanction cities or counties that do not cooperate.[88]

Whether the result of voluntary alliances or state-mandated cooperation, these limited-purpose regional solutions are relatively rare. Their use might increase if suburbanites recognize that their communities' interests lie beyond their residential status[89] and if communities of color can find ways to retain their political power while seeking regional alliances to address the economic and social problems presented by concentrations of poverty.[90] While civil rights advocates should be alert to press the advantages that regionalism offers, they must also turn their efforts to the federal level.

III. A Call to Action: The Federal Government's Response

In the introduction to the 1999 Report of the Citizens' Commission on Civil Rights, the editors mention the problem of concentrated poverty:

> *Particularly daunting [in 1993, the twenty-fifth anniversary of the Kerner Commission] was the plight of the minority poor, most of whom were locked in racially and economically isolated areas with little opportunity for advancement. When the Kerner Commission wrote in 1968, many of the country's central cities could still offer great opportunities for employment and economic advancement. By the early 1990s, employment and economic wealth had shifted to the suburbs, . . . and the movement of the middle class of all racial and ethnic groups out of cities had intensified.*[91]

And the report contains a general recommendation that the President develop a comprehensive economic policy designed to assist "particularly minorities who live in high concentrations of poverty in inner cities[.]"[92]

This has not been done. Perhaps sprawl has not received attention because it is not recognized or prioritized as a civil rights issue. It is hoped that the overwhelming evidence of the federal government's key role in creating the problem of sprawl and concentrated poverty presented in this chapter will motivate appropriate positive steps on the part of the President and Congress. Efforts to address sprawl, transportation, education, pollution, and economic development must be undertaken with a consciousness of their consequences for inner-city residents. The promotion of national goals — economic prosperity, enhancing the environment and improving safety, mobility, and quality of life — can serve as the framework for federal actions.

The magnitude of this problem cannot be underestimated. The breadth of the effort to rectify the consequences of concentrated poverty must match that magnitude. That effort must include plans adequate to dismantle the barriers that isolate African Americans from the real opportunities of the twenty-first century.

- *As a first step, each federal agency or program must evaluate all funding that* *goes to support local governmental units, or to provide housing, transportation, education, health care, environmental benefits or services, infrastructure or energy support. As to each, there should be an accounting, to ascertain whether facially neutral criteria are in fact maintaining or expanding the racial and economic boundaries created by the dynamics of the sprawled and fragmented metropolitan areas described in this chapter.*

- *Existing laws that provide opportunities to remediate concentrated poverty or opportunities for the federal government to foster regional cooperation must be fully enforced.*

Examples include:

ISTEA/TEA 21

The Intermodal Surface Trans-portation Efficiency Act (ISTEA) of 1991 and the Transportation Equity Act for the 21st Century (TEA 21) have the potential to advance civil rights goals and overcome fragmentation through the empowerment of metropolitan planning organizations (MPOs), multi-juris-dictional entities that must create long-range transportation plans for the region.

ISTEA and TEA offer several important opportunities, in the form of restraints on the power of the MPOs. First, the transportation planning process requires public involvement, which opens transportation planning to the input of low-income communities of color. Secondly, the MPOS must "seek out and consider the needs of those traditionally underserved by existing transportation systems, including but not limited to low-income and minority households" in the planning process. Finally, MPOs must comply with all applicable laws, which arguably include the Civil Rights Act, the Americans with Disabilities Act, and the Executive Order on Environmental Justice. Reference to these civil rights laws can further open the process to equity concerns.

ISTEA and TEA 21 provide billions of dollars per year for local highway use, through the federal Highway Trust Fund. Thus the federal leverage to influence local/regional entities in pursuit of the fair allocation of transportation funds, to move isolated urban residents to centers of opportunity, is substantial.

Title VIII

Federal agencies and executive departments are already required to administer programs related to urban development in a way that advances the goals of fair housing laws, by preventing further segregation and striving for integration of protected class members throughout the metropolitan region. Since "urban development" includes employment growth, adequacy of educational systems, transportation, and housing development, this mandate represents another significant opportunity to address existing inequitable distribution of these resources. Advancement of fair housing goals requires efforts to overcome the fragmented nature of most metropolitan governments. A comprehensive evaluation of all grants should be undertaken. If any federal grants exacerbate or perpetuate segregation, there must be immediate steps to rescind or amend those grants. As noted in the Atlanta air pollution case, the leverage created by funding conditioned on meeting federal standards is effective.

Title VI

Title VI provides that "no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance." Because nearly all local governments receive some form of federal support, nearly all are subject to its anti-discrimination requirements. Again, every federal agency should review under Title VI all funding policies and practices, to ascertain impact on people of color, even where there is no evidence of racist intent.

"[R]ecipients should have available for the department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs."[93] A more targeted approach to addressing fragmentation's effect on the administration of programs, and the resulting impact on communities of color, could take the shape of a regional equity audit, or a mapping of the opportunity-enhancing and -denying structures in the metropolitan region.

Additionally, programs administered under the Clean Air Act, the President's Executive Order on Environmental Justice, the Congestion Mitigation and Air Quality Funds, and the Job Access and Reverse Commute Program should be reviewed for opportunities to address sprawl and urban concentrations of poverty.

- *Other federal efforts to promote regional solutions must be evaluated and fostered.*

Federal agencies have initiated some efforts to promote cooperation among jurisdictions, effectively promoting a reduction in fragmentation, although typically without equity as the goal. For example, "HUD and HHS have promulgated regulations that compelled collaboration among entities and organizations at several levels (such as Councils of Government, or COGs), to qualify for funding."[94]

The federal government supports regional structures through funding. A recent study found that 669 regional councils of various types receive direct and indirect federal funding. Efforts to evaluate and enhance cooperation should be made.

- *New legislation*

The Community Character Act. The purpose of this legislation, which died in committee last fall, was to respond to the fact that "our landscape has been pockmarked by incremental haphazard development, . . . which too often saps our economic strength by requiring very expensive investment for extending infrastructure farther and farther into the countryside."[95]

The proposed Community Character Act provided financial incentives and technical assistance to state and local governmental entities conducting comprehensive growth planning. The goal is to integrate state and local land use plans into larger federal goals, thus acknowledging a federal role in land use. Because the resources that state and local planning entities would receive through block grants would have been channeled through the Department of Housing and Urban Development (HUD), the planning would have had to comply with the duty of HUD and fund recipient agencies to affirmatively further fair housing goals in comprehensive planning. The result, if this duty were enforced, would have been the opening of housing opportunity throughout metropolitan regions: agencies would be required to plan in a way that does not discriminate against and contributes to the integration of protected class members.

Another bill that did not survive committee but similarly carried potential for reducing the impact of political fragmentation in our metropolitan regions is the National Affordable Housing Trust Fund bill, introduced in summer 2000. Under this bill, the profits created by federal mortgage programs would be dedicated to the creation of mixed-income, affordable housing. What was particularly compelling about this bill as drafted was the mandate that housing be created only in neighborhoods with fewer than 20% residents living in poverty and where employment opportunities are developing. Moreover, the housing would be targeted to very low-income renters and owners, with 75% of the budget dedicated to housing for extremely low-income rental and 25% to low-income rental and home ownership. Additionally, this bill would have required a 40-year commitment from the developers and/or owners of the housing. This bill would have spurred the creation of housing in high-opportunity areas, maintained the housing there, and greatly increased the likelihood that residents of segregated and concentrated poverty neighborhoods would have access to housing throughout a given metropolitan region. In these ways, the impact of fragmentation on the siting of affordable housing would have been lessened.

- *Review federal policies that contribute to the problems of central cities.*

The federal government continues to contribute to the disinvestment of central cities. For example, where federal funding is tied to the population size of cities, even as cities lose scores of residents to the suburbs, sprawl is supported and the incentive for regional solutions is diminished. Another example is the continued subsidization of highways and the support of gasoline prices far below those found in other countries. Policies such as these must be reviewed and, at least as to direct federal funding, altered so as not to undermine civil rights goals.

IV. Conclusion

Many things have changed since the 1968 Kerner Commission Report starkly described two societies in America, one white, one black. The position of some African Americans has improved. But the plight of many more has become more drastic. Today more African Americans live in poverty in our central cities than ever before. Today the opportunities they need to thrive — good jobs, decent housing, and adequate schools — are continuing to move farther beyond their reach.

Changing this reality requires a change in the thinking of the President and Congress. They do need to continue efforts to pass and implement laws and policies that provide equal access and affirmative assistance. But they also need to focus on the structural dynamics that created the existing segregated urban landscape. They must acknowledge the key role of the federal government in creating and perpetuating the problem. They must develop a new approach that will move African Americans toward the opportunities that have been denied. Both the President and Congress must create policies that will address fragmentation and dismantle the structures that effectively deny to metropolitan residents living in concentrated poverty opportunities intended for them. This chapter suggests the first steps for such executive and congressional action.

Endnotes

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[2] While this chapter focuses on the effects of urban sprawl and fragmentation on African Americans, these phenomena have the same consequences for all people of color who live in the concentrated poverty of many city centers. Their civil rights are equally at risk.

[3] *See, e.g.*, David Rusk, *Cities Without Suburbs* (1995); David Rusk, *Inside Game/Outside Game: Winning Strategies for Saving Urban America* (1999) ("*Inside Game/Outside Game*"); Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) ("*American Apartheid*"); Gerald E. Frug, *City Making: Building Communities Without Building Walls* (1999) ("*City Making*"); Dennis Judd and Todd Swanstrom, *City Politics: Private Power and Public Policy* (1994).

[4] *See Inside Game/Outside Game* at 66-69, 96 (1999); Christopher Leinberger, "The Market and Metropolitanism," *The Brookings Review*, at 35 (Fall 1998).

[5] *See City Making* at 97-98,117-118, 157-58 (1999); Sheryll D. Cashin, "Localism, Self-interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism," 88 *Georgetown Law Journal* 1985, 2003-06 (2000) ("Tyranny of the Favored Quarter"). The fact that not all suburbs fit the stereotype of a prosperous pastoral single-family lifestyle and that city/suburb constructs differ quite distinctly from region to region across the country render the "city/suburb" terms problematic for some commentators. *See, e.g., City Making*. While many African Americans live in suburbs, the migration out of the city center into suburbs post World War II is uniformly characterized by white flight and public as well as private efforts to exclude African Americans from this migration. Since the suburban formative process was uniformly racially exclusionary, the term "suburb" suffices to describe the issues raised in this report, recognizing that suburbs are not homogenous in other respects.

[6] *See Inside Game/Outside Game* at 66.

[7] *Id.* at 67.

[8] *Id.* at 67-68. The migration of people who live in urban areas from city to suburb occurred at the same time that African Americans were moving in unprecedented numbers from the rural South to the urban North, West, and South. In the 1950s 1.5 million African Americans migrated from the rural South, and in the 1960s 1.4 million; these numbers represent twice the movement observed in an earlier wave of African American migration, which began in 1910 and continued into the 1920s. *See American Apartheid* at 29, 45.

[9] *See Inside Game/Outside Game* at 67.

[10] *See* Tyranny of the Favored Quarter at 1985, 1992 (citing Nancy Burns, *The Formation of American Local Governments: Private Values in Public Institutions* (1994) (*"American Local Governments"*) and data from the U.S. Census Bureau).

[11] *See American Local Governments* at 102; Tyranny of the Favored Quarter at 1985, 1992; Paul Kantor, *The Dependent City Revisited: The Political Economy of Urban Development and Social Policy*, at 164 (1995) (*"Dependent City Revisited"*).

[12] *See American Local Governments* at 102; Tyranny of the Favored Quarter at 1985, 1992; *Dependent City Revisited* at 164; Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States*, at 131 (1985) (*"Crabgrass Frontier"*).

[13] *See* john a. powell, "Sprawl, Fragmentation and the Persistence of Racial Inequality: Limiting Civil Rights by Fragmenting Space," at 11-12 (2001) (forthcoming chapter in *Urban Sprawl: Causes, Consequences, and Policy* (Gregory Squires, ed.)) ("Sprawl, Fragmentation"); Tyranny of the Favored Quarter at 1985, 1993; *Crabgrass Frontier*; and Gary Weiher, *The Fractured Metropolis: Political Fragmentation and Metropolitan Segregation* (1991).

[14] *See* Tyranny of the Favored Quarter at 1985, 1993 (2000) (citing *American Local Governments* at 75-95). While noticeable race effects were not noted by this researcher in the 1970s and 1980s, the desire to avoid taxes (associated with expensive services) was present. *See American Local Governments*. This could be a pretextual motivation. Regardless, once space is racialized, no further overt discrimination is necessary to maintain the existing segregation. *See* Richard Thompson Ford, "The Boundaries of Race: Political Geography in Legal Analysis," 107 *Harvard Law Review* 449, 451 (1995) ("Boundaries of Race").

[15] *Inside Game/Outside Game* at 71-72, 105-06.

[16] *See id.* at 71-72, 105-06; Sprawl, Fragmentation at 19.

[17] *See* Paul A. Jargowsky, *Poverty and Place: Ghettos, Barrios, and the American City*, at 118 (1997) (*"Poverty and Place"*); *Inside Game/Outside Game* at 71-72.

[18] *See American Apartheid* at 67-74.

[19] *See id.* at 67-74.

[20] *See* Sheryll Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, at 3 (draft) (Sept. 2000) (on file with authors).

[21] *See id.* at 37-38, 41-42, 50-51, 58 (citing Myron Orfield, *Washington Metropolitics: A Regional Agenda for Community and Stability*, at 19, 38, and generally (1999)).

[22] *See id.* at 3.

[23] *See* Sprawl, Fragmentation at 6.

[24] *See* Tyranny of the Favored Quarter at 2016.

[25] *See Inside Game/Outside Game* at 86; *American Apartheid* at 51; Boundaries of Race at 451; *see also* Sprawl, Fragmentation at 6.

[26] *See Inside Game/Outside Game* at 86-89; Sprawl, Fragmentation at 8; *American Apartheid* at 53 (*citing Crabgrass Frontier* at 205-206, 231-233).

[27] *See* Boundaries of Race at 451.

[28] *See Inside Game/Outside Game* at 86, 88.

[29] *See* Michael H. Schill and Susan M. Wachter, "The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America," 143 *University of Pennsylvania Law Review* 1285, 1286-90 (1995).

[30] *See* Boundaries of Race at 451 (*citing* Charles Abrams, *Forbidden Neighborhood: A Study of Prejudice in Housing*, at 231 (1955)).

[31] *See* Sprawl, Fragmentation at 7; *Crabgrass Frontier* at 195-218; *American Apartheid* at 51-52.

[32] *See Inside Game/Outside Game* at 87 (*citing* Irving Welfeld, *Where We Live: A Social History of American Housing* (1988)).

[33] *See id.* at 86-88.

[34] Civil rights advocates also helped reduce the extent of discriminatory practices through litigation including *Shelly v. Kramer*, 334 U.S.C. § 1, 68 Supreme Court Reporter 836 (1948) and the Fair Housing Act of 1968.

[35] *See Inside Game/Outside Game* at 88. The deduction of mortgage interest from federal income tax liability also stimulates home ownership at the expense of renters, favoring those who obtained mortgages over those who could not; in fiscal 1999 the value of this deduction was estimated to be $54.4 billion in tax breaks for 40 million homeowners. *See Inside Game/Outside Game* at 89. The deductibility of mortgage interest favors suburbs over cities, as rental properties are more common in the latter. Also, homeowners build equity in their property, a major factor of wealth creation in this country, and another opportunity afforded whites at the expense of African Americans. If treated as a budget appropriation the 1999 value of this deduction would constitute the federal government's sixth largest expenditure, after social security, national defense, Medicare, interest paid on the national debt, and Medicaid. *See Inside Game/Outside Game* at 89.

[36] *See Inside Game/Outside Game* at 90-91; *see also City Making* at 134.

[37] *See* Jonathon Barnett, *The Fractured Metropolis: Improving the New City, Restoring the Old City, Reshaping the Region*, at 163 (1995) (*"Fractured Metropolis"*).

[38] *See Inside Game/Outside Game* at 90-91.

[39] *See The Fractured Metropolis* at 162.

[40] *See Inside Game/Outside Game* at 91.

[41] *See id.*; *American Apartheid* at 44; *City Making* at 132-133; Sprawl, Fragmentation at 10.

[42] *See City Making* at 133.

[43] *See Inside Game/Outside Game*.

[44] See Sprawl, Fragmentation at 11 (*citing* John D. Kasarda, *Urban Change and Minority Opportunities, The New Urban Reality*, at 56 (1985)).

[45] *See, e.g., Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, No. CV 94-5936 TJH, Consent Decree (C.D.California Aug. 29, 1996); Ron Hayduk, *Regionalism and Structural Racism*, at 10-11 (Sept. 2000) (draft paper prepared for The Race and Community Building Project of The Aspen Institute Roundtable on Comprehensive Community Initiatives) (*"Regionalism and Structural Racism"*).

[46] *See* Robert Puentes, *Flexible Funding for Transit: Who Uses It?* Brookings Institution report: Survey Series of the Brookings Institution Center on Metropolitan Policy, at 1, 2 (available at <*http://www.brook.edu/urban/flexfundingexsum.htm*>) (May 2000).

[47] *See* Christopher Leinberger, "The Market and Metropolitanism," *The Brookings Review*, at 35, 36 (Fall 1998).

[48] *See id.*

[49] *See Inside Game/Outside Game* at 92.

[50] *See id.*

[51] *See id.*

[52] *See City Making* at 143; *American Apartheid*; Sprawl, Fragmentation at 11; Boundaries of Race at 449, 457.

[53] *See City Making* at 143.

[54] *See id.* at 134.

[55] *See Ambler Realty Co. v. Village of Euclid*, 297 Federal Supplement 307, 316 (1924), reversed in *Village of Euclid v. Ambler Realty Co.*, 272 U.S.C. § 365 (1926).

[56] *See Crabgrass Frontier* at 155; *American Apartheid* at 36; Boundaries of Race at 457; *Inside Game/Outside Game* at 57; *City Making*.

[57] *See* Boundaries of Race; John Charles Boger, "Race and the American City: The Kerner Commission in Retrospect: An Introduction," *in* "Symposium on The Urban Crisis: The Kerner Commission Report Revisited," 71 *North Carolina Law Review* 1289 (1993); *American Apartheid*; Sprawl, Fragmentation.

[58] *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* 429 U.S.C. § 252 (1977); *Martinez v. Bynum*, 461 U.S.C. § 321 (1983); *San Antonio Independent School District v. Rodriguez*, 411 U.S.C. § 1 (1973); *City Making* at 134; Boundaries of Race at 1841, 1860-1878.

[59] *See Milliken v. Bradley*, 418 U.S.C. § 717 (1974).

[60] *See Evans v. Buchanan*, 555 Federal Reporter 2d 373 (3d Circuit 1977); *Cunningham v. Grayson*, 541 Federal Reporter 2d 538 (6th Circuit 1976).

[61] *See* Boundaries of Race at 458; *City Making* at 134.

[62] *See San Antonio Independent School District v. Rodriguez*, 411 U.S.C. § 1 (1973).

[63] *See* Sprawl, Fragmentation at 17.

[64] Neither interjurisdictional issues nor proof of intent to discriminate has proven to be an obstacle in lawsuits that challenge the adequacy of education provided by the state, a claim arising from the state constitution. These actions are not based on federal notions of equal protection or due process but a right based in a state's constitution. *See, for example, Sheff v. O'Neill*, 238 Conn.1, 678 A.2d 1267, 111 Ed. Law Rep. 360 (Conn. July 9, 1996).

[65] *See City Making* at 134 (*citing* Boundaries of Race).

[66] *See* Tyranny of the Favored Quarter at 1985, 2018; *Fractured Metropolis* at 113.

[67] *See Inside Game/Outside Game* at 33; Sprawl, Fragmentation at 13 (*citing Fractured Metropolis* at 111-113).

[68] *See Fractured Metropolis* at 111-113.

[69] *See* Tyranny of the Favored Quarter at 1985, 2010.

[70] *See id.* at 1985, 2009, 2018.

[71] *See id.* at 1985, 2009.

[72] *See Inside Game/Outside Game* at 117.

[73] *See* Neil Peirce, *Citistates: How Urban America Can Prosper in a Competitive World*, at 28 (1993).

[74] *See Poverty and Place* at 122-23.

[75] *See* William Julius Wilson, *When Work Disappears: The World of the New Urban Poor*, at 29-30 (1997) ("*When Work Disappears*").

[76] *See* Sprawl, Fragmentation at 20 (*citing When Work Disappears* at 20-21).

[77] *See* Tyranny of the Favored Quarter at 2014; Sprawl, Fragmentation at 21 (*citing American Apartheid* at 153, 169-170; Gary Orfield, "Urban Schooling and the Perpetuation of Job Inequality in Metropolitan Chicago," *in Urban Labor Markets and Job Opportunity* (1992)).

[78] *See City Making* at 137.

[79] *See* Tyranny of the Favored Quarter at 2019 and sources cited therein.

[80] *See* Sprawl, Fragmentation at 6.

[81] *See id.* at 25-29, 38-39; john a. powell, "Race, Poverty, and Urban Sprawl: Access to Opportunities Through Regional Strategies," 28 *Forum for Social Economics* 1, 9 (1999) ("Race, Poverty, and Urban Sprawl").

[82] Examples of this include the displacement of African Americans and Hmong when the public housing on the North Side of Minneapolis was demolished to make way for mixed income housing and the migration of poor Hispanics from the Mission District of San Francisco to poorer neighborhoods around the Bay Area.

[83] The movement for metropolitan-wide government beginning in the 1950s and lasting into the 1970s did not succeed. *See* John J. Harrigan, *Political Change in the Metropolis*, at 342-65 (1993).

[84] *See* Race, Poverty, and Urban Sprawl at 1, 7.

[85] *See* john powell, "Addressing Regional Dilemmas for Minority Communities," *in Reflections on Regionalism*, at 236-37 (1999).

[86] *See* Tyranny of the Favored Quarter at 1985, 2048 (*citing* Richard Briffault, "The Local Government Boundary Problem in Metropolitan Areas," 48 *Stanford Law Review* 1115 (1996); Richard Briffault, "Our Localism, Part I — The Structure of Local Government Law," 90 *Columbia Law Review* 1, 2 n.1 (1990); Richard Briffault, "Our Localism: Part II — Localism and Legal Theory," 90 *Columbia Law Review* 346, 426-27 (1990); Jerry Frug, "Decentering Decentralization," 60 *University of Chicago Law Review* 253, 273-79 (1993); Georgette C. Poindexter, "Collective Individualism: Deconstructing the Legal City," 145 *University of Pennsylvania Law Review* 607 (1997)).

[87] *See Inside Game/Outside Game* at 223-238; Myron Orfield, *Metropolitics* (1997); Tyranny of the Favored Quarter at 1985, 1992.

[88] *See* Tyranny of the Favored Quarter at 1985, 2037-38 (*citing* David Firestone, "Georgia Setting Up Tough Anti-Sprawl Agency," *The New York Times*, Mar. 25, 1999, at A20).

[89] *See, generally*, discussion of the "ageographical city" in *City Making* at 101-105.

[90] *See* john a. powell, "Race and Space," *The Brookings Review*, at 20-22 (Fall 1998); Race, Poverty, and Urban Sprawl at 1, 12-13.

[91] *See* The Citizens' Commission on Civil Rights, *The Test of Our Progress: The Clinton Record on Civil Rights*, at 1 (1999) (Corrine M. Yu and William L. Taylor eds.).

[92] *See id.* at 15.

[93] *See Regionalism and Structural Racism* at 22.

[94] *See id.*

[95] *See* 146 Congressional Record S7908-01, *S7911 (2000).

Chapter 8

Federal Fair Housing Enforcement at a Crossroads: The Clinton Legacy and the Challenges Ahead

by John Relman[1]

Introduction

Midway through the second Clinton term, the Citizens' Commission on Civil Rights reported that the Justice Department had continued its "impressive fair housing enforcement efforts," but that the Department of Housing and Urban Development's (HUD) performance had been "decidedly mixed."[2] On the positive side, the Commission observed that Secretary Cuomo had done a "remarkable job in a difficult political climate" of protecting HUD's fair housing budget and promoting certain high profile settlements, but that HUD still had shown "little improvement . . . in its ability to process fair housing complaints effectively and expeditiously."[3]

Nearly three years later, the Justice Department continues to earn high marks for its determined and productive fair housing enforcement program. While new case filings have dipped a bit, damage awards and settlements have matched the impressive results of the prior two-year period. The Department's fair lending and disability initiatives have yielded a number of important victories, and amicus briefs have been filed in support of private plaintiffs in an array of cases raising vital new issues. Equally important, Assistant Attorney General Bill Lee won a much needed budget increase for the Civil Rights Division that has resulted in 21 new positions for the Housing Section and given it the resources it needs to expand its enforcement work.

HUD, on the other hand, has performed less well. Secretary Cuomo's fair housing enforcement program has met with little success during the final two years of the second Clinton term. A strategy of self-promotion that Cuomo began early in his tenure to burnish HUD's image on Capitol Hill in order to win more funding has, in the end, produced more spin than substance. At the conclusion of the Clinton Administration, the harsh reality sadly remains that, notwithstanding Cuomo's success in winning budget increases for the agency, HUD's dismal record in processing fair housing complaints shows no signs of improvement. Fair housing policy initiatives have foundered, and morale within the fair housing section at HUD has eroded. The high expectations that Cuomo's arrival at the agency generated among fair housing advocates have ended in frustration and disappointment.

The point is illustrated by a press release issued during the final days of the Clinton Administration, in which Secretary Cuomo proclaimed the many ways that he and his staff had "transformed a monolithic government agency into a model of government reinvention."[4] The lead paragraph noted that the General Accounting Office had taken HUD off its "high risk" list "as a result of significant management reforms set in place under Secretary Andrew Cuomo's leadership."[5]

Whether Secretary Cuomo's extravagant claims with respect to all of HUD's departments and programs are supported by objective evidence is a matter that exceeds the scope of this Report. It is clear, however, that when it comes to fair housing enforcement, Cuomo's public pronouncements are contradicted by HUD's own statistics. Indeed, the major accomplishment noted in this final press release with respect to fair housing — a claim that under Cuomo's leadership HUD "doubled the number of anti-discrimination actions taken under the Fair Housing Act" since 1997[6] — is false. The trend is in the opposite direction. HUD fair housing enforcement actions have, on a relative scale, declined across the board since 1997.[7]

Cuomo has had some important victories for which he deserves credit. In its 1999 Report, the Commission noted that at a time when conservatives in Congress were looking for ways to dismantle HUD, Cuomo's success in protecting HUD's budget and winning substantial increases for fair housing programs was "nothing short of stunning."[8] Cuomo's success in this regard continued for the balance of his term. HUD's overall budget increased from $25.2 billion in FY1999, to $26.2 billion in FY2000, and finally to $32.4 billion in FY2001.[9]

Funding for fair housing enforcement efforts also increased during this time period. In FY2000, for example, the budget for the Office of Fair Housing and Enforcement (FHEO) increased by 7.5% from $40 million to $43 million. Cuomo requested and won a substantial increase in funding for the all-important Fair Housing Initiatives Program (FHIP) from roughly $17 million per annum to $24 million in FY2000.[10] This program channels much needed enforcement dollars directly to private nonprofit fair housing testing organizations around the country. Six million dollars of the FHIP budget was set aside for a national discrimination testing program designed to assess levels of discrimination in the areas of housing sales, rentals, and mortgage lending to minorities.[11]

These continuing victories in the budget battles on Capitol Hill, however, must be juxtaposed against a fair housing enforcement record that in virtually all respects remains as dismal as before, largely unchanged and unimproved from the disappointing state of affairs reported by the Commission in 1999. If anything, efficiency and productivity have eroded further over the past two years, accompanied by an exodus of high-level personnel who have chafed under the demands of Cuomo's highly politicized regime.

None of the problems discussed in the subsections below should be attributed to a lack of effort by FHEO's senior manager (and the senior manager during the Clinton-Bush transition), David H. Enzel, a knowledgeable, committed, and capable executive who has worked hard over the last 18 months to plug the holes in the dike. But unless significant resources and attention are directed to overhauling this beleaguered bureaucracy, there is little hope that HUD will be able to shift course any time soon and begin to fulfill the promise of the statutory scheme envisioned by Congress when it revised the Fair Housing Act in 1988 to give HUD new enforcement powers.

As political appointments are made at both the Department of Justice and HUD and the transition to the new administration becomes complete, warning signs loom on the horizon. Although it is still too soon to draw conclusions, indications are emerging that reversals may be in store for the fair housing enforcement programs at both agencies that will further weaken the enforcement effort at HUD and slow the progress that has been made at the Justice Department. The next six months may prove critical in setting the course that fair housing enforcement will take for the balance of the Bush Administration. Fair housing advocates will need to monitor developments carefully.

The remainder of this chapter is divided into three sections. Part I focuses on HUD's fair housing performance over the last two years, analyzing both policy initiatives and case management problems. Part II assesses the Justice Department's performance. This section focuses on new cases filed, significant case settlements, and successful program initiatives. Conclusions and recommendations are set forth in Part III.

I. The Department of Housing and Urban Development

A. Complaint Processing

Since 1995, claims received by HUD have steadily increased.[12] Over the past two years, the number of claims filed with HUD has remained at the same high levels. HUD received approximately 7,190 claims in FY1999 and 6,200 claims in FY2000, roughly equivalent to the 6,190 claims received in FY1997 and the 6,800 claims filed in FY1998.[13] Of these claims, HUD processed only approximately 31% as actual "complaints," electing to close the remainder for failure to satisfy one of four "jurisdictional" requirements concerning coverage under the Fair Housing Act, standing, and statute of limitations issues.[14]

Under the Fair Housing Act, HUD is required to investigate all complaints of discrimination. If HUD concludes at the end of the investigation that there is reasonable cause to believe that discrimination has occurred, it must issue a charge. It is the issuance of the charge that triggers the complainant's right to either proceed before an administrative law judge or have the Department of Justice prosecute the case in federal court. If there is no "cause finding" and no basis for issuance of a charge, the case is dismissed.[15] The decision whether to issue a charge is of critical importance to the complainant. It determines whether the case will proceed to trial or will be dismissed. The number of charges filed also serves as a barometer of HUD's willingness to find and prosecute discrimination.

Despite the continuing high numbers of claims processed, the percentage of total claims resolved in which a "cause finding" was issued during this time period remained unacceptably low. In FY1999, only 1.7%, or 114 of the 6,527 claims resolved resulted in a cause finding.[16] In FY2000, this percentage dipped slightly to 1.4%, or 99 of 7,124 claims resolved.[17] These figures represent a significant drop from 1995, when fully 8% of resolved claims ended in cause findings.[18] As the Commission noted in 1999, what is remarkable about the high levels of claims processed and cases resolved is that it has been accompanied by a relative decrease in the number and percentage of cause findings.[19] In this respect, nothing has changed from the time this disturbing trend was identified and discussed in 1999.

In discussing this development in its earlier Report, the Commission noted that:

> *The trend is moving in the wrong direction. It seems unlikely that the quality of the cases received by HUD has changed so dramatically over the last two years. Rather, at a time when Secretary Cuomo has proudly and publicly accepted President Clinton's challenge to double the number of fair housing enforcement actions, it appears that HUD investigators and regional counsel have inexplicably raised the bar for complainants to have their case heard by a fact finder, whether it be an administrative law judge or a federal jury.*[20]

The same could be said now based on the FY1999 and 2000 numbers. But in one important sense the trend is more disturbing because HUD's budget for fair housing enforcement is now at a higher level than it was in FY1998.

Low levels of cause findings have been accompanied in turn by worsening delays in the completion of the mandatory investigations required before a cause determination can be made. The Fair Housing Act mandates that HUD complete its investigation of a complaint within 100 days "unless it is impracticable to do so."[21] Failure to meet this requirement, however, has never been held to constitute a jurisdictional bar to prosecution of a complaint.[22] As a result, since 1988, HUD has routinely allowed complaints to stagnate — many times for as much as a year past the 100 day limit.[23] These delays are devastating. Witnesses disappear or die, memories become hazy, complainants lose heart, and defendants complain loudly at trial about the lack of a speedy and fair adjudicatory process.

HUD's early difficulties in meeting the 100-day limit following passage of the Fair Housing Amendments Act were the subject of focused and sustained criticism by fair housing advocates.[24] In response to this criticism HUD appeared to make some progress in 1993 and 1994,[25] but the timeliness of its investigations always remained a sore point. Since 1994, delays in processing complaints have steadily worsened. In 1994, the average number of days from time of complaint receipt to cause finding or closure was 154 days. By FY1997, the average time to cause or closure had stretched to 350 days. In FY1999, average processing time had reached 400 days; and in FY2000 it rose to 497 days.[26] Between FY1997 and FY2000, the average time for reaching cause determinations increased from 448 days to 656 days; and the average time for reaching a no cause determination rose from 461 days to 515 days.[27]

Viewed from a slightly different perspective, at the end of FY1999, fully 78% of the total complaints in the HUD inventory, or 2,229 complaints, had been pending for more than 100 days. At the end of FY2000, that number had dropped only marginally to 68% of total complaints, or 1,751.[28]

In short, over the last two years there has been no improvement in the speed or efficiency with which complaints are investigated and resolved. The situation has continued to deteriorate, even though substantially fewer claims initially received are being accepted and investigated as complaints than was the case in 1994.[29] The end result has been greater delay in making fewer cause determinations. The story told by these statistics simply does not square with the fair housing enforcement "record" trumpeted by Secretary Cuomo in his end-of-term press release.

B. Compensation to Victims

1. Settlements and Conciliations

The amount of monetary relief that HUD has been able to win for victims of housing discrimination through settlement increased steadily from 1989 through FY1998, starting at $799 as an average compensation per case in the first year following passage of the 1988 Fair Housing Amendments Act, and ending at $15,727 in FY1998.[30]

Over the last two years, however, compensation obtained through settlement has declined. In FY1999, average compensation per case dropped off sharply to $3,400, reflecting total compensation of $6.2 million won in 1,825 successful conciliations.[31] In FY2000, total compensation increased dramatically to $23.9 million, but nearly $17 million of that total was obtained in one large settlement with Riverside County in a case alleging discrimination against Hispanic mobile home owners.[32] And of that settlement, $16.1 million constituted loans and grants for community-based projects.[33] Calculated with the Riverside settlement, the 2,148 cases successfully conciliated in FY2000 yielded an average compensation of $11,120.[34] Excluding the loan commitments obtained in Riverside, and including only the $747,000 in damages obtained for victims in that case, the FY2000 average compensation amounts to $3,600, only slightly more than the FY1999 average case recovery.[35]

The current trend in average case compensation is even more troubling when viewed in terms of the average time it now takes to reach a successful conciliation. In 1995, average time to conciliation was 172 days.[36] By 1998, average elapsed time had increased to 251 days.[37] In FY1999, that number had reached 280 days, and in FY2000 it had increased yet again to 314 days.[38] Once again, the conclusion is not favorable to HUD. In sum, over the last two years cases conciliated by HUD have taken longer and won less for complainants.

2. Administrative Law Judge Decisions

In its 1999 Report, the Commission noted that the number of cases tried to decision before HUD administrative law judges (ALJs) had decreased substantially due to a drop-off in the number of cases charged and an increase in the number of complainants and respondents electing to have charged cases prosecuted by the Department of Justice.[39] In 1996, parties elected to have 70% of charged cases handled by the Justice Department.[40] In 1997, the election rate decreased slightly, but still remained at the surprisingly high rate of 61%.[41]

Over the last two years the election rate has dropped slightly to 53%, and the number of cases tried to decision before administrative law judges has crept up from six to seven cases.[42] The HUD administrative law judge hearing process, however, remains underutilized, and HUD's highly competent and skilled ALJs have been left all but looking for more work. The recent departure of HUD's Chief Administrative Law Judge, Alan Heifetz, one of HUD's most experienced, knowledgeable, and committed fair housing jurists, may be attributed in part to the dearth of work. This loss will be felt throughout the entire HUD fair housing enforcement process.

In terms of monetary relief to victims, with one notable exception, damage awards in these recent ALJ decisions have been roughly consistent with awards in prior years.[43] In FY1999, HUD ALJs decided two cases alleging discrimination on the basis of familial status and two cases claiming discrimination based on race and color, finding for the complainant in three of the four decisions.[44] These three cases resulted in a total of $106,227.50 in damages and $11,550 in civil penalties, with an average compensatory award per case of approximately $35,000.[45]

In FY2000, HUD ALJs found for the complainant in two of three decisions.[46] One of these decisions, *HUD v. Wilson*, resulted in one of the largest compensatory damage awards ever obtained in a fair housing case.[47] In that case, Judge Heifetz ordered a white supremacist who made public threats on the Internet against a public housing advocate and her daughter to pay more than $1.1 million in compensatory damages and $55,000 in civil penalties.[48]

The small number of ALJ decisions during the last two years and the wide range of monetary relief obtained make it impossible to draw any meaningful conclusions about trends, or to compare either aggregate damage totals or per case averages awarded in earlier periods.[49]

C. Policy Initiatives

In its 1999 Report, the Commission noted that HUD had undertaken several policy initiatives that appeared potentially promising.[50] Nearly three years later, virtually none of these initiatives has come to fruition, and the pipeline for future initiatives seems dry. As with other aspects of the Clinton Administration's civil rights agenda, the expectations that Cuomo raised among fair housing advocates in 1995 and 1996 have largely ended in disappointment.

In May 1997, HUD announced that it had implemented a series of self-styled "management reforms" recommended by Price–Waterhouse to speed the processing of complaints.[51] As discussed at length above, there has been little noticeable improvement in the speed or efficiency of HUD's investigations or cause decisions. Efforts to decentralize decision making by delegating authority to regional offices[52] have also had little discernible effect on HUD's chronic inability to reduce red tape and improve the quality of complaint processing.[53] Equally important, there is no indication that HUD has managed to monitor effectively state and local agencies who receive HUD funding to process fair housing complaints and HUD referrals to ensure that cause findings are being issued where appropriate and claims are being processed in a timely manner.[54]

Secretary Cuomo's much publicized effort to double the number of charge filings, referred to earlier, in effect became a central policy initiative of the last four years. This initiative has now proved to be a failure.[55] The unintended effect of this effort has been to divert much needed resources from complaint processing to a handful of "high profile" investigations or complaints that have been used by the front office for press purposes.[56] Although the Commission commented favorably in its last report on the initial press value of these headlines in generating support on Capitol Hill for HUD's programs,[57] with the exception of one large settlement in Riverside, California, on behalf of migrant farm workers, even these "high-profile" investigations have had only limited success during the last two years in improving HUD's standing with the public or delivering relief to victims of discrimination.[58]

Efforts to push through additional regulations have largely stalled. HUD has yet to draft regulations on the important topic of disparate impact claims, and although comments were due nearly one year ago for proposed regulations on sexual harassment, these regulations have yet to be made final.[59] One of Cuomo's most publicized initiatives, housing discrimination studies that were initially designed and funded in 1997 to identify levels of housing and lending discrimination across the nation through the use of thousands of fair housing tests, has yet to be released.[60] Although HUD deserves credit for publishing an insightful and provocative study concerning racial disparities in subprime lending,[61] no Secretary-initiated fair lending or predatory lending cases have been filed in the past two years based on this report or any enforcement reviews conducted of lending institutions by HUD staff.[62]

In short, despite the many press releases and promises, when it comes to policy initiatives HUD appears to have done no better than tread water for the past two years. Much is due to a lack of leadership at the top and poor morale within FHEO. The unique demands created by Cuomo's personal leadership style resulted in the departure of a number of highly qualified and committed managers within FHEO over the last few years.[63] The effects have been felt in all aspects of HUD's fair housing performance, but perhaps nowhere as deeply as in the area of policy initiatives.

II. The Department of Justice

A. New Cases Filed

Under the Fair Housing Act, the Department of Justice has the power to bring primarily two types of cases: pattern and practice cases and "election cases."[64] The latter are complaints that have been filed with HUD and charged by the Secretary. Once a charge is issued, either party — complainant or respondent — may "elect" to have the case prosecuted by the Department in federal court. If an election is made by a party, the Department is required to file suit. With pattern and practice cases, on the other hand, the Department has discretion to file if it concludes that the evidence is strong enough to support a finding that a pattern or practice of discrimination exists.

Over the last two years, the total number of new pattern and practice case filings has decreased slightly from the previous two years. In FY1997 and 1998, the Department filed a total of 39 new pattern and practice cases.[65] In FY1999 and 2000, the Department filed a total of 32 pattern or practice cases.[66] Of these filings, 14 were the result of testing done by the Department, 6 were lending cases, and 6 were election cases with pattern or practice counts added.[67] In terms of type of case, this breakdown mirrors that of the previous two-year period.[68] Election case filings, on the other hand, have continued to decline, reaching a record low in FY1999 of 22, and increasing slightly in FY2000 to 26.[69] This is down from a high of 149 filings in FY1995 and 1996.[70]

The Department of Justice, of course, can hardly be faulted for the small number of election case filings; the rate limiting factor for these cases is based on the pace of HUD cause findings. But the declining numbers of pattern and practice case filings remain difficult to explain. A significant accomplishment of Bill Lee's tenure as Assistant Attorney General for Civil Rights is the increase in budget funding he won for the Civil Rights Division in FY2000. The Housing and Civil Enforcement Section received authorization for approximately 21 new positions. It may be too early to expect an increase in pattern and practice filings as a result of this expansion, but it is not at all clear why those filings actually decreased in FY2000. With fewer election cases competing for the Section's resources, and more attorneys available to investigate and prosecute pattern and practice cases, the time would appear ripe for a significant expansion in the number and type of pattern and practice filings.

B. Damage Awards

The Housing Section has continued to produce impressive damage awards over the course of the past two years. As noted in earlier Commission Reports, comparing aggregate totals between years can be misleading because one or two large settlements may drive the outcome for the entire year. Similarly, declining numbers of election case filings may distort both damage totals and calculations of average awards. By any measure, however, the section has continued to obtain excellent results.

New filings for FY1999 produced $9.3 million in compensatory damage awards and $855,000 in civil penalties.[71] Average awards in election cases remained steady at approximately $15,000.[72] Average, per case, monetary relief in pattern and practice cases hovered around $480,000.[73] This latter average, however, was driven primarily by recoveries in two lending cases and a new construction case that totaled $6.3 million.[74] Likewise, two new election filings with pattern and practice counts yielded an additional total of $1.7 million in relief.[75]

FY2000 filings produced equally good results. Compensatory damage awards held steady at $9.2 million.[76] Yet as in 1999, one pattern and practice case, *United States v. Delta Funding Corp.*, drove the total, with a total recovery of $7.3 million.[77] Excluding the recovery in *Delta Funding Corp.*, the average damage recovery in new pattern and practice filings was $211,000.[78] Average per case relief in election cases increased to approximately $41,000.[79]

These totals, of course, do not include many cases filed in the last two fiscal years that remain open. Notwithstanding these annual fluctuations in the total number of cases tried or settled, the Housing Section is continuing to win significant damage awards for victims of housing discrimination that in many parts of the country are continuing to set the standard for damage recoveries in both private and government cases.

C. Enforcement Initiatives

In prior years the Housing Section's fair housing enforcement initiatives have focused on three areas: the testing program; lending and homeowners' insurance discrimination; and access for persons with disabilities in newly constructed multifamily housing.[80] Over the last two years, the Department has continued to focus its resources on lending and new construction cases, but appears to have shifted away from developing and filing new testing cases. Several new and important sexual harassment cases have been filed and settled, signaling a renewed interest in this important enforcement area.

1. New Construction Cases

Several of the Department's most impressive victories in recent years have come in the new construction area. A series of investigations in Nevada have produced stunning results over the last two years, yielding multi-million-dollar settlements and commitments to retrofit hundreds of apartment units in order to make them accessible to persons with disabilities.[81] One of the Nevada cases, *United States v. Camden Trust*, resulted in the creation of a $1.7 million fund to retrofit common areas and individual units, the largest to date in a new construction case. Multiple investigations initiated in the Northern District of Illinois also have produced excellent results, if not quite at the Nevada level.[82]

2. Lending

The lending program has also continued to produce impressive and important results. In 1999, the Department won a $3 million settlement in a suit brought against Deposit Guaranty National Bank alleging that the Bank had discriminated against African American applicants for home improvement loans.[83] The settlement was particularly noteworthy because it represented the first time the Department had focused extensively on the use and misuse of credit scoring systems. In 1999, the Department also filed its first suit against a consumer credit card bank, Associates National Bank, alleging that the Bank had violated the Equal Credit Opportunity Act by subjecting Hispanic applicants to stricter underwriting standards and less favorable terms.[84] The case was settled in January 2001 after the Bank agreed to pay $1.5 million in compensatory damages and reform its policies.

In March 2000, the Department, joining forces with HUD and the Federal Trade Commission, filed suit against Delta Funding Corporation, a subprime mortgage lender operating in minority areas of Brooklyn and Queens, New York.[85] The complaint alleged that Delta Funding underwrote loans with higher mortgage broker fees for African American women than for similarly situated white males, paying kickbacks to brokers to induce them to refer applicants, all without regard to the applicant's ability to repay the loan. The Company's goal, the complaint alleged, was to expose minority borrowers to the risk of default or foreclosure. The case resulted in an important victory for the government, with Delta agreeing to pay $7.5 million in damages and eliminate its policy of funding loans with discriminatory or unearned broker fees.

3. Sexual Harassment

The past two years have also produced a marked increase in pattern and practice filings alleging sexual harassment by landlords and housing providers. Buoyed by its victory in *United States v. Crawford*, a 1998 case that resulted in a $490,000 jury verdict against an Akron, Ohio, landlord accused of sexually harassing tenants and applicants,[86] the Department has filed three new pattern and practice sexual harassment cases since 1999. The first, *United States v. Prestonwood Properties*, alleged that a Texas housing provider had sexually assaulted tenants over a period of six years.[87] The Department won $150,000 in compensatory damages for 17 victims, along with a court order barring the defendant from owning or managing any residential rental property for four years. In addition to *Prestonwood*, the Department filed two additional complaints alleging similar practices at a group of Jackson, Mississippi, rental properties, and at an apartment complex in New Hampshire.[88]

4. The Testing Program

In past reports the Commission has remarked repeatedly upon the extraordinary success of the Housing Section's testing program.[89] Since 1992, when the Department filed its first pattern and practice cases based on evidence gathered by its own fair housing testers in local communities across the country, 62 testing cases have been filed through August 2000, resulting in $7.4 million in compensatory damages and $1.4 million in civil penalties.[90] Of the 62 cases, 59 have been favorably resolved, either by settlement or at trial.[91]

The past two years have witnessed a falloff in the filing and settlement of new testing cases. This may be the natural result of efforts to focus resources on new and different priorities, or the inevitable consequence of a change in leadership in the testing program and the need for start-up time to adjust to new program management. At this point, however, there is no reason to believe that testing case filings will not return to earlier levels.

5. Amicus Filings

Over the last two years, the Department's amicus filings have been a surprising bright spot in the enforcement program. The Department deserves credit for filing three important briefs in private sector cases. In *Hargraves v. Capital City Mortgage Co.*, the Department filed an amicus brief in support of the plaintiffs' position that reverse redlining — the practice of marketing and selling predatory loans in minority neighborhoods because of the race of the neighborhood — violates the Fair Housing Act.[92] The case resulted in the first federal court decision holding that reverse redlining can constitute a violation of the Fair Housing Act.[93] The Department also filed an amicus brief supporting the plaintiffs in a novel but important case challenging discriminatory loan practices by car dealers under the Equal Credit Opportunity Act.[94] This case will have important ramifications for the Department's fair lending program. And in *Fair Housing of Marin v. Combs*, the appellate section of the Civil Rights Division filed a noteworthy brief in the 9th Circuit arguing for an appropriately expansive interpretation of standing rights under the Fair Housing Act.[95]

III. Conclusion and Recommendations

Notwithstanding the impressive fair housing enforcement record that the Justice Department has amassed throughout the second Clinton term, ten months into the Bush Administration it is not at all clear whether the progress made will continue. As noted above, the Housing Section has received 21 new positions in the last two years, and has created several new deputy section chief positions to oversee fair lending and discriminatory zoning cases. Yet with all this new firepower, the Bush leadership has yet to authorize the filing of a single new lending discrimination case.

Although it is too soon to draw conclusions, warning signs lie on the horizon. New, highly conservative political appointees in the office of the Assistant Attorney General for Civil Rights have recently taken office, and the first indications are emerging that reversals may be in store for the fair housing and lending program. Likewise, it is clear from Attorney General Ashcroft's recent pronouncements that some amount of resources will likely be diverted from the Civil Rights Division's enforcement efforts to deal with the administration's war on terrorism.[96] Whether the battle against terrorism will become a convenient excuse for a slowdown in new filings and investigations remains to be seen. Advocates will need to monitor developments in coming months closely.

Prospects for the future appear even bleaker at HUD. President Bush has yet to appoint an Assistant Secretary for Fair Housing. For ten months HUD has operated without a General Deputy Assistant Secretary for FHEO. Recently, HUD announced that Kenneth Marcus would fill that spot. This is not an appointment that inspires confidence. Mr. Marcus's reputation is that of a conservative ideologue who has made his name in the fair housing arena suing FHEO and HUD employees for damages in their individual capacities in an effort to restrict HUD's ability to enforce the Fair Housing Act. His appointment has had a negative impact on morale at FHEO.

The real danger at HUD now lies in the distinct possibility that the new administration will deal with the complaint processing backlog by summarily dismissing complaints without proper investigation or legal analysis. HUD has a long way to go before it can claim to have mastered the case management and processing problems that have plagued the agency since 1988. To date, there is no indication that the current administration has the understanding, ability, will, or desire to overcome these problems.

A. Recommendations for the Department of Housing and Urban Development

- Secretary Martinez should move quickly to determine why cause determinations, as a percentage of total complaints, have remained at such low levels. Senior HUD management should take steps to ensure that investigators and regional counsel are applying proper legal standards in evaluating complaints. Where necessary, new training should be instituted to assist investigators in discovering relevant facts and assembling the evidence necessary to determine whether there is reason to believe discrimination has occurred.

- The backlog of over-age cases must be brought under control. Secretary Martinez should establish a strike force of top investigators and regional counsel to complete investigative reports on the oldest of HUD's pending complaints. The Secretary should allocate additional resources to FHEO to ensure that all complaint investigations are completed in as close to 100 days as possible. Care must be taken, however, to ensure that complaints and claims are not given short shrift to improve "the numbers" without due regard for the completion of a proper investigation and legal analysis.

- To expedite merits determinations, FHEO staff should direct regional investigators to enlist the assistance of local private fair housing organizations wherever possible in conducting fair housing tests as soon as the complaint is filed.
- The number of Secretary-initiated complaints remains unacceptably low. Secretary Martinez should direct the Office of General Counsel to investigate, prepare for litigation, and charge 25 Secretary-initiated cases, including lending cases, before the end of FY2002.

B. Recommendations for the Department of Justice

During the past two years, the Department has successfully implemented several of the recommendations contained in the Commission's 1999 Report. The Department has exceeded the Commission's recommendation that it fund ten new attorney positions;[97] worked closely with the private sector and nonprofit community to identify important issues that would benefit from Justice Department attention;[98] and allocated more resources for investigation of lending practices (and particularly the subprime market).[99] The following items, however, should remain Department priorities for the new administration:

- With election case referrals from HUD continuing to decline, the Housing Section should focus its expanded resources on increasing the number of new pattern and practice case filings. The section should reasonably be expected to increase by half the number of new cases filed between now and the end of FY2002.
- Given the remarkable success of the Housing Section's testing program over the years, the Housing Section should expand the program so that testing can be directed at more than just rental practices. Testing should be aimed, for example, at real estate sales companies that engage in interstate business, and at lending and insurance practices.
- To maintain its leadership role in the areas of lending and insurance discrimination, the Department must complete lending and insurance investigations now pending and increase the number of new case filings. In particular, the Department should allocate additional resources to permit a more comprehensive investigation of the subprime lending market.
- The Housing Section should continue its efforts to work with the private sector and nonprofit community to identify issues, areas, and cases that would benefit from DOJ intervention.

Endnotes

[1] The author is indebted to Gretchen Rohr for her able assistance in helping prepare this chapter.

[2] Citizens' Commission on Civil Rights, *The Test of Our Progress: The Clinton Record on Civil Rights*, at 231 (1999) ("1999 Commission Report").

[3] *Id.*

[4] Department of Housing and Urban Development (HUD) News Release No. 013 (Jan. 17, 2001).

[5] *Id.; see also* HUD News Release No. 00-332 (Nov. 20, 2000) (hailing "astonishing turnaround" at HUD under Cuomo's leadership).

[6] *Id.*

[7] National Council on Disability, *Reconstructing Fair Housing*, at 43-47 (Nov. 6, 2001) ("NCD Study").

[8] 1999 Commission Report at 232.

[9] HUD News Release No. 013 (Jan. 17, 2001).

[10] Funding Availability for the Fair Housing Initiatives Program, 65 Federal Register 9,467 (Feb. 24, 2000).

[11] *Id.*

[12] 1999 Commission Report at 223.

[13] NCD Study at 54.

[14] NCD Study at 55; HUD Internal FHEO National "TEAPOTS" Tracking System Report (2001) (provided to author upon request) ("FHEO Tracking System Report").

[15] 42 U.S.C. § 3608(e)(2)(B)(I)-(iii).

[16] FHEO Tracking System Report.

[17] *Id.*

[18] 1999 Commission Report at 233. But compare NCD Study at 79-82 (tracking cause findings as percentage of total cases, and noting that absolute numbers of cause findings have dropped dramatically from FY1994 to FY2000).

[19] 1999 Commission Report at 233.

[20] *Id.*

[21] 42 U.S.C. § 3610 (a)(1)(B)(iv).

[22] *See, e.g., Kelly v. HUD*, 3 Federal Reporter 3d 951, 956 (6th Circuit 1993); *Baumgardner v. HUD*, 960 Federal Reporter 2d 572, 578 (6th Circuit 1992).

[23] *See, e.g.,* 1993 Commission Report at 87; 1995 Commission Report at 186; R. Schwemm, *Housing Discrimination*, at 24-15 n.90.1 (1998).

[24] *See* Commission Reports cited in n.21 *supra.*

[25] 1995 Commission Report at 183, 186.

[26] NCD Study at 90.

[27] *Id.* at 100, 102.

[28] *Id.* at 289-290.

[29] *Id.* at 90.

[30] NCD Study at 109; 1999 Commission Report at 234.

[31] FHEO Tracking System Report; but *see* NCD Study at 109 (calculating average compensation per case in FY1999 at $6,741).

[32] FHEO Tracking System Report; *HUD v. Riverside County, California*, reported at Fair Housing-Fair Lending Rptr. Report Bulletin ¶ 7.1 (July 1, 2000) (settlement valued at more than $17 million in housing-related relief for migrant farm workers).

[33] HUD News Release No. 00-110 (May 22, 2000).

[34] FHEO Tracking System Report.

[35] *Id.*

[36] NCD Study at 98.

[37] *Id.*

[38] *Id.*

[39] 1999 Commission Report at 234.

[40] *Id.*

[41] *Id.*

[42] FHEO Tracking System Report.

[43] For discussion and analysis of ALJ awards in prior years, *see* 1999 Commission Report at 235.

[44] *HUD v. Kocerka,* 2 Fair Housing-Fair Lending (Aspen) (landlord held liable for refusing to rent to interracial couple) ¶ 25,138 26,138 (HUDALJ May 4, 1999); *HUD v. Schmid,* 2 Fair Housing-Fair Lending (Aspen) (refusal to rent to families with children) ¶ 25,139 26,146 (HUDALJ July 15, 1999); *HUD v. Gunderson,* 2 Fair Housing-Fair Lending (Aspen) ¶ 25,140 26,155 (HUDALJ Aug. 25, 1999) (landlord not liable for refusing to rent to interracial couple who planned to conduct home business); *HUD v. Active Agency,* 2 Fair Housing-Fair Lending (Aspen) ¶ 25,141 26,157 (HUDALJ Sept. 22,1999) (real estate agent liable for discriminating against families with children by telling prospective mobile home owners the park did not allow children).

[45] *Id.*

[46] *HUD v. Cubello,* 2 Fair Housing-Fair Lending (Aspen) ¶ 25,144 26,167 (HUDALJ June 5, 2000) (property owner liable for refusing to rent to families with children); *HUD v. Blue Meadows,* 2 Fair Housing-Fair Lending (Aspen) ¶ 25,145 26,171 (HUD ALJ July 5, 2000) (defendant not liable where applicant with disability failed to state a prima facie case); *HUD v. Wilson,* 2 Fair Housing-Fair Lending (Aspen) ¶ 25,146 26,178 (HUDALJ July 19, 2000) (white supremacist held liable for harassing fair housing advocate and engaging in unlawful acts of interference and intimidation). This does not include the decision on remand against the complainant in *HUD v. Gunderson,* 2 Fair Housing-Fair Lending (Aspen) ¶ 25,147 26,197 (HUDALJ Aug. 14, 2000).

[47] *HUD v. Wilson,* 2 Fair Housing-Fair Lending (Aspen) ¶ 25,146 26,178 (HUDALJ July 19, 2000).

[48] *Id.*

[49] 1999 Commission Report at 235.

[50] *Id.* at 235-237.

[51] *Id.*

[52] NCD Study at 41.

[53] *Id.* at 145-148, 193-195.

[54] *Id.* at 85-86; 189 (examining FHAP [Fair Housing Assistance Program agencies – otherwise referred to as state and local agencies] cause determinations by region; and noting that at the end of FY1999 fully 60% of the complaints in FHAP agencies were more than 100 days old).

[55] *Id.* at 43-47.

[56] *Id.* at 147-149.

[57] 1999 Commission Report at 236.

[58] 1999 Commission Report at 235-36; *HUD v. Riverside County, California*, reported at Fair Housing-Fair Lending Rptr. Report Bulletin ¶ 7.1 (July 1, 2000) (settlement valued at more than $17 million in housing related relief for migrant farm workers); NCD Study at 147-149, 42-45.

[59] Fair Housing Act Regulations Amendments Standards Governing Sexual Harassment Cases, 65 Federal Register 67666 (2000) (to be codified at 24 C.F.R. Part 100) (proposed Nov. 13, 2000).

[60] 1999 Commission Report at 236-237.

[61] HUD, *Unequal Burden: Income and Racial Disparities in Subprime Lending in America* (Apr. 2000); HUD, U.S. Department of Treasury, *Curbing Predatory Home Mortgage Lending: A Joint Report* (June 2000).

[62] This does not include the joint action, undertaken by HUD with the Department of Justice (DOJ) and the Federal Trade Commission, against Delta Funding Corporation discussed elsewhere in this Report. *See also* NCD Study at 113-114 (only two Secretary-initiated cases filed in area of disability).

[63] *See also* NCD Study at 41-42 (noting loss of capable managers resulting from reorganization and devolution of complaint processing functions to regional hubs).

[64] 42 U.S.C. § 3614 (a), 3612 (o).

[65] 1999 Commission Report at 237.

[66] Internal DOJ Tracking Report, prepared by the Housing and Civil Enforcement Section of the Department of Justice ("DOJ Tracking Report").

[67] *Id.*

[68] 1999 Commission Report at 237.

[69] DOJ Tracking Report.

[70] 1999 Commission Report at 237.

[71] DOJ Tracking Report.

[72] *Id.*

[73] *Id.*

[74] *Id. United States v. Associates National Bank*, Civil Action No. 188-15-1 (D.Del. 1999); *United States v. Deposit Guaranty National Bank*, Civil Action No. 188-40-4 (N.D.Mississippi 1999); *U.S. v. Camden Property Trust*, No. CV-8-99-112-DWH (D.Nevada 2001), reported at Fair Housing-Fair Lending Rptr. Report Bulletin ¶ 4.11 (Apr. 1, 2001) ($1.9 million settlement).

[75] *United States v. Prestonwood*, C.A. No. 175-75-80 (N.D. Texas 1999); *U.S. v. Boston Housing Authority*, C.A. No. 175-36-270 (D.Massachusetts 1999).

[76] DOJ Tracking Report.

[77] Civil Action No. 188-52-7 (E.D.N.Y. 2000).

[78] DOJ Tracking Report.

[79] *Id.*

[80] 1999 Commission Report at 238.

[81] *See, e.g., U.S. v. Camden Property Trust*, No. CV-8-99-112-DWH (D.Nevada 2001), reported at Fair Housing-Fair Lending Rptr. Report Bulletin ¶ 4.11 (Apr. 1, 2001) ($1.9 million settlement); *U.S. v. Rock Springs Vista Development Corp.*, C.A. No. S-97-1825-JBR (D.Nevada 1999), reported at Fair Housing-Fair Lending Rptr., Report Bulletin ¶ 2.3 (Feb. 1, 2000), 2001 WL 488884 (9th Circuit 2001) ($1 million settlement).

[82] *See, e.g., United States v. J & G Construction Co.*, C.A. No. 99C-4403 (N.D. Illinois 1999), reported at Fair Housing-Fair Lending Rptr., Report Bulletin ¶ 4.5 (Apr. 1, 2000) (settlement involving 16 covered units); *United States v. Orchard Hill Building Co.*, C.A. No. 99-4404 (N.D. Illinois 1999), reported at Fair Housing-Fair Lending Rptr., Report Bulletin ¶ 1.20 (Jan. 1, 2000) (settlement involving 16 townhouses and 40 condominium units).

[83] *United States v. Deposit Guaranty National Bank*, C.A. No. 3:99CV670 (S.D. Mississippi 1999).

[84] *United States v. Associates National Bank*, C.A. No. 99 196 (D.Delaware 1999).

[85] *United States v. Delta Funding Corp.*, 00 1872 (E.D.N.Y. 2000).

[86] *Walker v. Crawford*, C.A. No. 5:98 CV 1033 (N.D. Ohio Oct. 26, 1999).

[87] *United States v. Prestonwood Properties, Inc.*, C.A. No. 3:99-CV-0495-R (N.D. Texas Mar. 8, 1999).

[88] *United States v. L.T. Jackson*, C.A. No. 3:99 CV 556 DN (S.D. Mississippi Aug. 9, 1999); *United States v. Mills*, C.A. No. 1:00 CV 00276 SM (D.N.H. June 7, 2000) (consent order entered Nov. 14, 2001 (awarding $100,000 in compensatory damages to four victims)).

[89] *See, e.g.*, 1999 Commission Report at 239.

[90] U.S. Department of Justice Testing Program News Release (Aug. 16, 2000).

[91] *Id.*

[92] *Hargraves v. Capital City Mortgage Corp.*, C.A. No. 98-1021 (D.D.C. 1998).

[93] 140 Federal Supplement 2d 7 (D.D.C. 2000).

[94] Brief of the United States as *Amicus Curiae* in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, *Cason v. Nissan Motor Acceptance Corp.*, No. 3-98-0223 (M.D. Tennessee Aug. 1, 2000).

[95] *Fair Housing of Marin v. Combs*, No. 0015925 (9th Circuit Apr. 28, 2000).

[96] Department of Justice News Release Concerning Reorganization to Meet Counterterrorism Mission (Nov. 8, 2001).

[97] 1999 Commission Report at 242 (recommendation 2).

[98] *Id.* (recommendation 4).

[99] *Id.* (recommendation 3).

Chapter 9

The Current Civil Rights Challenge for the Growing Latino Community: Inclusion and Participation in Political Life

by Marisa J. Demeo

Introduction

Census 2000 surprised much of the general public and the media when its results revealed that Latino[1] residents in the United States now number 35.3 million, or 12.5% of the total resident population of the U.S.[2] While Latinos have been in the United States in significant numbers for most of our country's history, the common perception, at least on the national level, was that Latinos were not a significant factor when discussing the economic, political, or cultural influences in the United States. Although the perception was not accurate, the new census data are changing that perception of the Latino influence in the United States.

Since the release of the 2000 census data, many political commentators and politicians have talked about the current and growing political clout of the Hispanic community. Those comments that equate demographic data with political empowerment, however, exaggerate the influence the Hispanic community has on policy decision-makers. This article explores the challenge facing the growing Hispanic community in the United States, to participate more fully and effectively in political life.

The first part of this article focuses on the immigrant Latino community. Citizenship is a necessary precursor to full political participation, but our country's views toward immigrants fluctuate, thus greatly affecting the immigrant community's ability to integrate fully. Achieving citizenship has become more difficult as our federal laws have increasingly viewed immigrants as a drain on the economy and as criminals. In addition, many barriers remain even in the process to become a citizen.

Citizenship alone, however, is not sufficient. The second part of this article reviews the limited access Latino citizens have to voting and electing representatives of their choice. Within the voting context, the primary obstacle preventing Hispanics from achieving more political power is the community's low rate of registration and voting. But in order to increase their political participation, Hispanics must surmount an assortment of barriers at the polling place and in the redistricting process. Until these problems are redressed, Hispanics will be unable to achieve their full political power.

I. Viewing Latino Immigrants as Contributing to the Economy and Citizens-in-Training, and Not as a Drain on the Economy or as Criminals

A. Background

Many Latinos living in the United States come from families who have lived in the United States for generations. Many do not know any country but the United States, and many do not speak Spanish. When, however, 40% of the Hispanic community living in the United States was born outside of the United States,[3] a discussion about the political participation of Hispanics in the U.S. cannot ignore a discussion about Latino immigrants.

Although often called the "nation of immigrants," the United States has had mixed feelings about immigrants, particularly newer immigrants, over the span of our history. Often, the state of the economy has greatly shaped America's feelings towards immigrants. When the economy is strong and there are many jobs to fill, America has welcomed immigrants and recognized their contribution to the economy. When, however, the economy goes sour, it is often the latest immigrants who are to blame for "taking jobs away from Americans." In addition to the state of our economy, racism, xenophobia, religious discrimination, as well as political beliefs such as "fighting communism" and "valuing diversity" have also shaped America's feelings and policies toward at least certain groups of immigrants. All of these factors have played a role in determining our immigration laws and practices at different points in our history.[4]

B. Changes to Immigration Law in 1996

One of the more recent trends seen by looking at changes in our immigration laws is the growing view of immigrants as criminals rather than on the road to citizenship. For many years, the primary distinctions in our immigration laws were between those who were undocumented and those who were documented. It was the undocumented who lived in constant fear of deportation, who were hesitant to leave the country for fear they could not get back in, and who tried to remain below the radar screen so as to not draw any unwanted attention to themselves. Once documented as a legal permanent resident (LPR) (or "green card" holder), immigrants felt secure in their residence in the United States. There were few distinctions between the obligations and rights of being an LPR and the obligations and rights of being a citizen. The most significant difference was that only citizens can vote, but beyond that, LPRs felt they were here to stay and as long as their children were U.S. citizens they often thought there was no pressing need to become citizens themselves.

In the early 1990s, the economy took a turn for the worse. One of the first places to feel the squeeze was California. When the economy became tight and layoffs were happening, many Californians blamed immigrants for what they were experiencing. Californians passed a statewide initiative called Proposition 187, which was designed to strip undocumented children of the right to attend school and legal immigrants of the right to receive various welfare benefits. Although the initiative was never implemented due to lawsuits filed by groups such as the Mexican American Legal Defense and Educational Fund (MALDEF), as the economy went down across the country Congress followed California's example and did it more successfully since it had the power to strip immigrants of federal benefits.

The Citizens' Commission on Civil Rights' report of 1999 entitled *The Test of Our Progress: The Clinton Record on Civil Rights* focused one of its chapters on the welfare reform provisions passed by Congress in 1996. The welfare reform law stripped *legal* immigrants of many welfare benefits even though legal immigrants were not only here in the United States legally but they were also working legally and paying into our tax system. Instead of revisiting the welfare law changes, this article focuses on two other laws passed in 1996 — the Illegal Immigration Reform and Immigrant Responsibility Act[5] (IIRIRA) and the Antiterrorism and Effective Death Penalty Act[6] (AEDPA) — which significantly affected the civil rights of immigrants in this country. The immigration laws were so dramatically changed under these laws that many of the legal protections that legal immigrants had were stripped away. What follows are a few examples to highlight the unfairness of the new laws.

Under the 1996 changes, Immigration and Naturalization Service (INS) officers can make many decisions to deport immigrants without any review from a judicial or quasi-judicial officer.[7] Appeals to a federal circuit court were also stripped away.[8] Although deportation has not been legally recognized as a punishment equivalent to criminal punishment, in many cases it could be equivalent, or even worse for some individuals. Deportation can mean not only losing a job, it can also mean losing your family, your home, and the place you consider your country.

The immigration law also requires mandatory detention in nearly all cases if the INS is planning to pursue administrative deportation charges against an immigrant.[9] The detention is mandatory in the case of "criminal aliens"[10] and is presumed in the case of noncriminal detainees unless they can prove "to the satisfaction of the officer" that they are eligible for release.[11] This means immigrants are detained without bond or individual custody hearings, sometimes for months. Often immigrants are held alongside criminals in state and local jails far from their families even though they have not committed a crime or perhaps have already served time for a petty crime committed years ago.

The 1996 law made small petty offenses equivalent to serious criminal offenses, so now immigrants are being deported for minor infractions such as shoplifting and high-school fights.[12] Under the changed laws, if a one-year sentence was imposed, even if the individual never served any of the time, he is subject to mandatory detention.[13] Although *ex post facto* laws are unconstitutional in criminal law, they have not been found to be so in immigration law. The 1996 law *requires* deportation for the petty offenses mentioned above no matter how long ago they occurred.[14] In addition, the 1996 law removed the immigration judge's discretion.[15] The mandatory deportations apply regardless of the nature of the offense, the extent of the immigrant's ties to the United States, evidence of rehabilitation, or the severity of the hardship the deportation would cause U.S. citizens or legal resident family members.[16]

These laws have created a wide divide between lawful permanent residents and citizens. Aside from the unjust results for the individual immigrants affected, the laws are having a larger societal effect of pushing immigrants away from full integration and incorporation. Legal immigrants who have lived in the U.S. for many years, who felt "American," are now feeling that America no longer sees them that way. While the passage of such laws has caused some immigrants to apply for citizenship in order to protect themselves, others feel less invested and connected to the political process in the U.S. than ever before.

The laws passed under IIRIRA and AEDPA are some of the harshest laws we have seen in our history because the targets of the law enforcement activities are long-term legal residents and not undocumented immigrants. While the legal immigrants have committed to or pled guilty to minor crimes, they have also paid their requisite penalties for those crimes under our criminal laws. Although some immigrants may deserve the additional penalty of deportation, none are given the guarantees that citizens have in our legal system of due process or judicial review. The cumulative effect of these laws is to disempower not only those directly subject to prosecution but also entire immigrant communities. Instead of becoming more involved in political life, immigrants become hesitant not only to engage politically but also even to access a whole assortment of government services or programs for which they are eligible, such as basic health services. One specific government program that deserves particular attention in the context of political empowerment is Latino immigrants' access to the government's naturalization program.

C. Access to the Naturalization Process

A person who is born outside of the United States generally enters the United States as a noncitizen of the U.S. The person can become a citizen through the legal process called naturalization. In an earlier section of this article, it was highlighted that 40% of the Hispanic community are foreign-born. Of the close to 13 million Latinos who were born outside of the United States, one out of four has naturalized and become a citizen yet the remaining three out of four are noncitizens.[17] Not all of the Hispanic noncitizens here in this country are eligible to naturalize. There are a number of ways to naturalize, but the most common is through the general naturalization provisions. Under these provisions, a person must be at least 18 years of age; be a lawful permanent resident of the United States; have resided in the U.S. for 5 continuous years; speak, read, and write English; have knowledge of U.S. government and history; and be of good moral character.[18]

One group of Latino immigrants who clearly are not eligible to apply for citizenship is undocumented immigrants. According to estimates produced by the INS, about 2.7 million undocumented persons in the United States are from Mexico.[19] Other Latin American countries, including El Salvador, Guatemala, Honduras, the Dominican Republic, Nicaragua, Colombia, Ecuador, and Peru, contribute another 885,000 undocumented persons to the U.S. total undocumented population.[20] Taking the total number of Hispanic noncitizens (9.5 million) and subtracting out undocumented Hispanics (3.6 million) as well as foreign-born Hispanics who are under 18 (1.7 million),[21] that still leaves over 4 million Hispanics who at least potentially fall into the range of persons who could apply for citizenship, if not immediately then within a handful of years.[22]

When so many in the Latino community are potentially eligible to naturalize but have not naturalized, it reduces the political impact that the community could have on the political process. There are a variety of reasons why many Hispanics who are eligible to naturalize have not. First, many eligible Latino legal residents have not even initiated the naturalization process. Contrary to what some might believe, this group of noncitizens overwhelmingly wants the United States to be their permanent home and believe becoming a citizen is important.[23] Even so, Mexican noncitizens (the largest Latino subgroup of noncitizens) continue to have low rates of naturalization,[24] but Canadians also have low rates of naturalization.[25] It has been hypothesized that sharing a border with the United States allows Mexicans and Canadians to have easy access to their home countries.[26] As a result, although Mexican and Canadian long-term residents of the United States may grow attached to the United States, it is harder for them to formalize the attachment through the process of naturalization since they can remain so active in life in the country of origin.[27]

Second, according to the National Latino Immigrant Survey (NLIS), a surprisingly high percentage (43%) of Latino immigrants who were eligible to naturalize had actually begun the process in some concrete way but for some reason naturalization did not occur.[28] When comparing those eligible immigrants who had not naturalized to those who did, a number of socio-economic and integration factors emerge as indicators separating the two groups. Older immigrants, immigrants who came at an early age, immigrants with higher incomes, immigrants with strong English skills, immigrants who work, and immigrants who owned homes were all more likely to succeed in naturalizing than those who had not naturalized.[29]

Beyond the societal barriers, there are also government-created barriers to naturalizing for Latino immigrants eligible to naturalize. Even though the statutory requirements for naturalization have steadily increased throughout our country's history,[30] the administration of the naturalization application process has also created a number of obstacles that have sometimes become insurmountable to Latino applicants.[31]

The naturalization program has often received little attention and priority as compared to other INS functions,[32] thus affecting the productivity of the Service in processing applications. While the law enforcement functions of the INS receive large sums of appropriated funds from Congress, the INS relies almost exclusively on fees paid by applicants to provide services such as naturalization processing. The fees alone often fall short of the resources that are needed for both processing and infrastructure development. To demonstrate the effect of lack of resources, the number of naturalization petitions filed between 1991 and 1998 was 6,197,701.[33] Except in 1991, every other year through 1998, the INS processed fewer naturalization petitions than were filed.[34] As a result, the INS did not reach a final resolution on 1,656,508 petitions.[35]

Once the data are explored further, a number of other red flags are raised that deserve attention and solutions. The INS has increasingly denied naturalization petitions. In 1991, the rate of denial was as low as 2% of the petitions that were processed.[36] By 1998, the percentage of applications being denied had risen to 22% of petitions that were processed.[37] Past studies have demonstrated that applications from Latin American and African countries experienced higher rates of denials than applications from other countries.[38] Those studies found that there were vast differences of denial rates between district offices, suggesting that differences in the applicant pools from different countries alone could not explain the high rates of denial from certain district offices.[39] Part of the problem in the past has been the decentralization of the process.[40] It would be important to delve further into the causes for the high denial rates.

A major reason in the past for administrative denials by INS of Latino naturalization applications was due to failure by Latino applicants to complete the application form properly.[41] Among the steps of the application process, the process of filling out the application has been the biggest deterrent for Latinos who are eligible to naturalize;[42] 15% of those eligible obtained the form but never completed it.

D. Recommendations

- Until the harsh aspects of the IIRIRA and AEDPA laws are reversed or at least scaled back, immigrants will find it difficult to integrate into all aspects of our society, including the political life.

- One way to address the societal barriers to naturalization would be for community-based organizations and government programs to target assistance to those who, because of socio-economic barriers, find it harder to start or even complete the process. Since the INS must have some contact with every legal immigrant who enters the country, it could design proactive programs to provide naturalization information and assistance to immigrants at the time of entry and again five years after becoming an LPR.
- With regard to the government-created barriers to naturalization, both community organizations and the INS should invest time and resources in removing these obstacles. Starting with the application, which is currently ten pages long with six pages of additional instructions, the INS should examine simplifying the form so that it is not such a barrier and provide more assistance at the community level so that more eligible immigrants will not only complete the form but also decrease their denial rates by filling them out correctly. In addition, INS should proactively present to community groups more information regarding the bases for denials. When more than 20% of applications are being denied, the INS is expending a huge amount of resources that ultimately do not serve the interest of the applicants who are eligible but made some error in the process.

II. Latino Citizens' Access to Voting and Electing Representatives of Their Choice

A. Low Registration and Voting Rates

The current population reports published by the Census Bureau for the 1986, 1990, 1994, and 1998 congressional election years reveal a fairly consistent pattern of low registration rates and even lower voting participation rates for the general population.[43] This disparity is further magnified for minorities, especially Hispanics who have particularly low registration and voting rates. In the four elections between 1986 and 1998, white registration rates fluctuated between 64% and 68% of the white voting age population, and 47% of the white voting age population consistently voted in elections.[44] Black registration fluctuated between 56% and 64%, while their voting rates ranged from 37% to 43%.[45] By comparison, Hispanic registration rates ranged between 31% and 36%, and their voting rates ranged from 20% to 24%.[46] A similar pattern exists for the elections that have occurred during Presidential election years.[47]

Some of this disparity between Hispanic registration and voting as compared to whites and blacks can be attributed to differences in citizenship rates. For example, the report on the 1998 elections analyzed registration and voting of citizens. In that election, 69% of whites, 64% of blacks, and 55% of Latino voting age citizens were registered to vote.[48] Of the citizen voting age population, 47% of whites, 42% of blacks, and 33% of Latinos actually voted.[49] Despite the decrease in the differences between Latinos and non-Latinos when citizenship is taken into account, there still exists a significant disparity in both registration and voting rates.

Government should play a role in examining how to make the voting process more accessible and to increase voter participation rates of all voters, with special emphasis on identifying the particular needs of minority voters who are registered but who vote less. The Census Bureau's own analysis reveals that both white and black registered voters listed as their top three reasons for not voting as: (1) no time off/too busy; (2) not interested; (3) ill/disabled/emergency.[50] While these three reasons fall into Latino registered voters' top four reasons for not voting, Latinos also listed "other reasons" for not voting as the second most common reason for not voting.[51]

B. Election Systems and Procedures

Once Hispanic citizens are registered to vote, they often face barriers to voting and having their vote counted, ranging from language barriers to unfair voting systems to even voter intimidation.

1. Language Barriers

In 1990, 14% of the U.S. population spoke languages other than English at home.[52] Of those persons who spoke other languages, 54% spoke Spanish in the home.[53] Although the detailed Census 2000 data have not been released, the Census Bureau did conduct a Census 2000 Supplemental Survey, which estimates that the percentage of the U.S. population speaking languages other than English at home has risen to 18%, and 60% of those persons are speaking Spanish at home.[54]

Not all persons who speak Spanish in the home are citizens and eligible to vote, but a fair number of them are. Some of the citizens who speak Spanish in the home are naturalized citizens, but others are persons who are native-born citizens. Native-born citizens whose first language is Spanish could be Puerto Ricans who were born in Puerto Rico as U.S. citizens and raised in a Spanish-speaking environment. When they come to the United States, although they are not immigrants, they still face many language barriers. In addition, other citizens, born in the States and raised in Spanish-speaking households, can also face language barriers.

In 1975, Congress recognized the language barriers that certain citizens faced in casting their vote when they extended protection against voting discrimination under the Voting Rights Act to "language minority groups."[55] If either 5% or 10,000 of the voting-age citizens of a political subdivision are limited English proficient and speak a single language, the jurisdiction is prohibited from providing materials exclusively in English.[56] Many states and local jurisdictions provide even further protection for a larger class of language minorities. Despite these legal protections, Latino citizens still face barriers when they try to cast their ballot at the polling place on election day.

In a report issued by the U.S. Commission on Civil Rights reviewing the voting irregularities that occurred in Florida in the Presidential election in 2000, the Commission unveiled a number of language barriers faced by Spanish-speaking Latino citizens.[57] According to testimony submitted by the Puerto Rican Legal Defense and Education Fund (PRLDEF), many Latino voters were turned away at the polls without proper language assistance.[58] The Commission found that many poll workers were not properly trained to handle language accessibility concerns.[59] In addition, the Commission found that in some cases, either willing bilingual volunteers or poll workers were stopped from providing assistance to voters with limited English skills.[60]

2. Voting System Barriers

In addition to language barriers, Latino citizens face barriers to casting their vote by the voting systems that are often used by states and localities in predominantly Latino neighborhoods. A lawsuit brought by MALDEF demonstrates this type of barrier to voting. MALDEF has filed a civil rights class action lawsuit in the Northern District Court of Illinois on behalf of Latino and African American voters challenging the non-uniform, arbitrary, and unequal system of voting in Illinois as violating section 2 of the Voting Rights Act of 1964, 42 U.S.C. § 1973, and the 14th Amendment to the Constitution of the United States."[61] The defendants include members of the Illinois State Board of Elections as well as a number of local election commissions and voting officials.

At issue in the complaint is that the type of voting systems that are located in predominantly Latino and African American voting areas are more likely to produce errors in voting that are not corrected than those voting systems available in other jurisdictions, thus infringing on the Latino and African American right to vote. In Illinois, most jurisdictions, including some of the jurisdictions with the highest concentrations of Latino and African American voters, use punch-card ballots. Other jurisdictions use optically scanned ballots. Most of the jurisdictions that use optically scanned ballots provide voters at the time they are at the poll with notice of certain errors on their ballots, and provide those voters an opportunity to vote again to correct the errors. This process is called "error notification." For purposes of the litigation, "errors" refer to the case in which a voter's ballot contains more votes for an office than allowed by law (an "overvote") or in which the tabulating machines cannot accurately read the voter's ballot. Punch-card ballots and optically scanned ballots without error notification have a higher error rate for recording, counting, and tabulating votes than do optically scanned ballots with error notification. In addition, punch-card ballots have a higher error rate among Latino and African American voters than among non-minority voters.

In Illinois, the state legislature has refused to change the state law to allow or require error notification to voters in election jurisdictions using punch-card voting systems. By comparison, state law requires error notification in election jurisdictions using optical-scan voting systems where the ballots are counted in-precinct. At these precincts, voters can have their ballots placed in tabulation equipment, which will return any ballot with an overvote or which cannot be read. Then the voter has the opportunity to obtain a new ballot and correct the vote.

In the Presidential election of 2000, the rate of votes not counted (the "fall-off rate") on ballots cast statewide was approximately 3.85%. In jurisdictions using optical-scanning systems with error notification, the fall-off rate was approximately 0.5%. By comparison, in jurisdictions and wards with significant Latino and African American populations, the fall-off rate was significantly higher. The City of Chicago, which used the punch-card voting system without error notification, had a fall-off rate of 7%. In the Chicago wards where 65% or more of the residents are Latinos and/or African Americans, the fall-off rates were even higher. In the heavily Latino 12th ward, the fall-off was 12.6%, and the predominantly African American 37th ward was 12.4%. Similarly, the Township of Cicero, with a significant Latino population and located within Cook County, using a punch-card system without error notification, had a fall-off rate of 8.8%. The City of East St. Louis, with a significant African American population and which used optical-scan balloting but without error notification, had a fall-off rate of approximately 11%.

To summarize the primary facts in the case, the majority of Latino and/or African American voters live in jurisdictions that use punch-card voting systems or that use optical-scan ballots without error notification, which result in substantially higher rates of voting error than optical-scan ballots with error notification. A larger proportion of Illinois' Latino and African American voters live in such jurisdictions than the proportion of Illinois' white voters who live in such jurisdictions. Moreover, in jurisdictions with punch-card voting systems, areas with high Latino and/or African American populations have higher error rates than areas with high non-minority populations. As a consequence, Illinois' Latino and African American voters are significantly less likely to have their votes counted than non-minority voters. Thus, in elections at all levels, including municipal elections, the voting strength of Latino and African American voters is thereby diluted and these voters have less opportunity than other members of the electorate to participate in the electoral process, to form coalitions with like-minded voters, and to elect representatives of their choice. The problem identified through MALDEF's case in Illinois is found in many parts of the country.

3. Additional Voting Barriers

Beyond the specific areas of language barriers and barriers created by certain voting systems, Latinos face a wide range of barriers to full and effective participation in the voting process by other practices. Examples from Texas will illustrate some of the other barriers Latino citizens must overcome to have their vote counted. This section raises the issues of lack of training for election judges; provisional and affidavit ballots; compliance with section 5 of the Voting Rights Act, 42 U.S.C. § 1973; and voter intimidation.[62]

With regard to training for election judges, MALDEF has received numerous complaints about election judges not administering elections in accordance with standing laws and regulations. Often, judges turn Latinos away from voting polls after telling them that they are not on the list of registered voters. Although Texas law allows a voter whose name does not appear on the voting rolls to complete a challenge affidavit and cast a vote, election judges often are unaware of this law and do not provide the voters an opportunity to vote. These examples demonstrate the need for additional education and training of election personnel.

Jurisdictions covered by section 5 of the Voting Rights Act must receive administrative approval from the United States Attorney General or judicial approval from the United States District Court for the District of Columbia for all proposed changes in voting laws or practices by proving that the proposed changes do "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or membership in a language minority group]." Texas is one of nine states fully covered by section 5; an additional seven states are partially covered by section 5. Section 5 coverage reaches all changes in voting, including polling location changes and changes in the hours of polling places. In the 1998 elections in Texas, MALDEF had to bring a lawsuit to prevent Bexar County from closing early, without the section 5 federal preclearance required, a number of voting polling places in Latino and African American neighborhoods.

MALDEF continues to intervene in situations of voter intimidation of Latino voters. In 2000, MALDEF defended a number of elderly Latino voters who were being harassed by a local district attorney in Fort Stockton, which is located in West Texas. It is very common for elderly and disabled Latino voters to cast their ballots by mail because they cannot physically travel to the polls. The people who help the elderly and disabled absentee voters are often Latinas from the neighborhood who have assisted voters for decades.

In a particularly close race for district attorney in the Fort Stockton area, the adjacent district attorney launched an investigation into the absentee voting of elderly and disabled Latinos, sent uniformed officials to their homes, demanded some people appear for a videotaped interrogation, asked them to reveal for whom they had voted, and ultimately gave the results of the investigation to the disgruntled loser of the election who then subpoenaed some of these elderly voters to appear in a court over 80 miles from their homes. MALDEF appeared to quash the subpoenas of the voters who could not appear. Many of the voters stated they would not vote again because of all they had experienced. Although this particular incident happened in a local election, federal elections are not immune from incidences of voter intimidation.

C. Creation of Latino Voting Districts During Redistricting

Every ten years, the U.S. Government counts the resident population of the United States through the census. Once the census data are available, governments at the state and local level go through a process called redistricting. Redistricting involves drawing district boundaries from which officials are elected for the U.S. House of Representatives, state legislative seats, as well as local wards, boards, and councils. One of the principles driving the need to redistrict every ten years is the concept of having "one person, one vote."[63] This means that the number of people in each voting district should be equal to the number in other districts in the jurisdiction, so that one person's vote will not count more than another person's vote.

When redistricting occurs, governments must ensure they comply with both constitutional and statutory requirements. One of those requirements comes from section 2 of the Voting Rights Act of 1965, which prohibits the creation or use of voting procedures that would deprive voters of an effective vote because of their color, race, or membership in a language minority group.[64] When the redistricting process occurs, state and local governments can draw political district boundaries that result in reducing Latino voters' ability to elect candidates of their choice. In some cases, line-drawers may try to pack many Latinos into one voting district when there are a sufficient number of Latinos to create more than one district.[65] In other cases, Latinos can be split into two districts, where they cannot affect the outcome of the vote in either; whereas, if they had been allowed to vote out of one district, they might have had the voting strength to affect the outcome.[66] In either situation, what could be occurring is called minority vote dilution.

One of the ways to avoid minority vote dilution is to create a voting district that is majority-minority. In other words, by drawing a political district that has over 50% of a racial or language minority population, the government increases the opportunity for that population to express their will at the polls. The reasons why courts approve majority-minority districts as a way to avoid vote dilution of minorities are numerous. Many jurisdictions have a history of discriminating against minority voters through poll taxes, literacy tests, and similar barriers. Some jurisdictions purposefully selected voting by all voters in the jurisdiction at large instead of from individual districts within the jurisdiction in order to reduce the power of a minority vote. In many, although not all, jurisdictions, voters are still voting in a racially polarized manner.[67] Experts can often prove racially polarized voting by demonstrating that minority voters tend to vote for the same candidate, and white voters tend to vote against the candidate whom the minority community wants elected. For these and other reasons, courts have looked favorably on the creation of majority-minority districts.

By way of illustration of the difficulty for Latinos to be elected from other than majority-Latino districts, one needs to look no further than the Latino members of Congress. Of the 19 members of Congress who are Hispanic, 18 are from congressional districts with at least 50% Hispanic population.[68] Only one member — Robert Menendez from New Jersey — succeeded in being elected to a district that was not majority Latino.[69] Even in Menendez' case, he was elected from a district that was more than 50% minority.[70] No Latinos have succeeded in being elected from a majority white district.[71]

For decades, MALDEF has played a lead role in ensuring that Latino voters' rights are protected in the redistricting process. This year is no exception. MALDEF has been active in presenting redistricting plans to various legislative bodies adopting redistricting plans, and where Latino voters would experience vote dilution by new plans that are adopted we have had to resort to litigation in states such as California and Texas. In California, MALDEF brought a case challenging the manner in which new congressional and State Senate district lines were drawn. California experienced significant growth (14%) of its total population between 1990 and 2000.[72] A stunning 80% of that growth was due to growth in the Hispanic community, which grew by over 40% of its population.[73]

In Texas, MALDEF challenged in court the way that the Texas House and Senate as well as the congressional lines were drawn. Texas experienced tremendous population growth (23%) between 1990 and 2000.[74] Sixty percent of the growth was due to growth of the Hispanic population, which experienced growth of 2.3 million more Latinos by the end of the decade.[75] Already, a court ruled in favor of MALDEF's case regarding the State House plan and created an additional Latino seat, but ruled against MALDEF on the State Senate plan.

Aside from the role that advocacy organizations such as MALDEF play to ensure the protection of the voting rights of Hispanics, the Department of Justice plays a central and critical role. The Department can also bring cases, such as the ones brought by MALDEF to ensure that minorities' voting rights are protected in the redistricting process. The Department also has an additional unique "preclearance" role, mandated by section 5 of the Voting Rights Act of 1964, which was explained more fully in an earlier section. This is a powerful tool that the Department can use to prevent a redistricting plan that harms Hispanic voters from being implemented. MALDEF has found that the Department's review under section 5 has sometimes comported with our analyses but sometimes has not. For example, the Department pre-cleared the redistricting plan for the Texas State Senate even though we challenged the plan. The Department did, however, issue an objection to the Texas House of Representatives' redistricting plan finding that the plan illegally retrogressed the voting strength of Hispanics in Texas. The court's decisions on the two plans suggest that much weight was given to the Department's analyses.

D. Recommendations

- In the area of low registration and voting rates, politicians and community organizations should tackle registered voters' decision not to participate because they are not interested. Government should explore expanding voting days and hours and even consider a day off from work to ensure those who could not vote because they do not have time off have the ability to participate in our political system. Government expanding days and hours, creating a holiday, or even making absentee ballots more accessible could also address the barriers for those who are ill or disabled. The federal government should also conduct some follow-up surveys, particularly of Hispanics who list "other reasons" as the second most common reason for not voting. There may be other obstacles that can be removed or addressed once they come to light.

- To address language barriers to voting, government, at all levels, must conduct a more aggressive education campaign before elections and a more aggressive enforcement campaign during elections to ensure that all citizens have full access to the voting process. Because much of election day operations occurs at a very local level, where resources can be limited, the federal, state, and larger local jurisdictions should invest money to design and implement training for election officials and poll workers in the area of language accessibility. Governments could also work with technology companies to design voting systems that are more accessible to those with language barriers. Finally, the Department of Justice, which is charged with enforcing the Voting Rights Act, should enforce more vigorously the provisions that apply to language minorities.

- The federal government could play a more proactive role in the area of removing voting system barriers by setting national federal standards for uniform and nondiscriminatory voting systems as they are used in federal elections. In addition, the federal government could provide grant money to states to assist them with improving and/or replacing voting equipment and technology. If the federal government fails to set such standards, states could also set such standards within their states and provide financial assistance to jurisdictions that have limited resources to upgrade their voting equipment.

- To ensure more training for election officials, the federal government could play a role at least with regard to federal elections by providing grant money for these purposes. In addition, the example regarding affidavit voting demonstrates the importance of having not only state laws for provisional and affidavit voting but also a mechanism to ensure notice and compliance with those laws. The federal government could play a role with setting standards in this area with regard to federal elections. States could further strengthen the training and compliance with their laws through investing personnel and resources from the state level to the local jurisdictions.

- Both the section 5 violation and the voter intimidation examples demonstrate that the Department of Justice needs to engage in vigorous enforcement of our voting laws to ensure no one is denied the fundamental right to vote.

- It cannot be emphasized enough that strict enforcement of both section 5 and section 2 of the Voting Rights Act by the Department of Justice in reviewing redistricting plans is critical to the political empowerment of Latino communities. Every ten years, the federal government should invest additional resources in reviewing the redistricting process throughout the country. Without the additional resources, the level of the Department's review and the reach of the arm of law enforcement will be limited.

III. Conclusion

This article has attempted to explore the biggest challenge facing the growing Hispanic community, translating demographic growth into political participation and power. While many challenges face the community, becoming a political force will go the

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furthest to address the myriad of issues facing the community, from immigration to education, from access to health care to access to good jobs.

The article started with a discussion on the Hispanic immigrant community. The federal government has increasingly treated immigrants as if they are a drain on the economy and as criminals. This trend pushes Latino immigrants away from integration and, until the trend is reversed, a large segment of the Hispanic community will find it difficult if not impossible to participate politically in the society. Even beyond integrating legal immigrants so that they feel a part of our society, there remain substantial barriers for those who are eligible to become naturalized citizens. The current system relies on individuals, who face socio-economic and government-created barriers to naturalizing, to surmount all barriers on their own. Instead, the article argued that proactive government steps should be taken to better educate and assist those who are closest to joining our democracy on a deeper level.

After discussing some of the ways to better integrate immigrants and assist them to the road to citizenship, the article switched gears and focused on the right to vote. In this half, the article reviewed the low rates of registration and voting for Latinos, even when citizenship is taken into account. Already some studies have identified what a number of the barriers are. The article proposed solutions such as expanding days and hours for voting and even creating a holiday to reduce some of the obstacles to voting, while recognizing that more needs to be done to identify additional barriers. The article explored a variety of obstacles faced by Hispanic voters at the polls, from language barriers to voting system barriers to barriers created by election personnel. While the article suggested a number of proposals, a key component to all of them was more investment in training, education, and technology by the federal, state, and local governments. Finally, the article discussed the obstacle to Hispanic voters being able to elect candidates of their choice when redistricting does not protect Latino voters. The key actor needed to assist the community in the redistricting area is the Department of Justice, which is charged with enforcing the Voting Rights Act in the area of redistricting as well as many other areas covered by this article.

In a short article, it would be impossible to solve the entire dilemma of the Latino community, which so far has failed to translate its demographic growth into full political participation and power; however, the article has attempted to raise some specific areas that, if addressed, could increase Hispanic political participation in the near future.

Post-Script: September 11

Since the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, the points made in the first half of the article related to the need to view immigrants as contributing to the economy and citizens-in-training have become more important. Because the individuals who committed the terrorist attacks were noncitizens, federal and local governments are making policy decisions and engaging in practices that push us further into the direction of viewing immigrants as criminals. To provide one example, Congress recently passed the Aviation and Transportation Security Act.[76] This bill contained a provision requiring that all baggage screeners at airports be citizens. While it is true that all the terrorists were noncitizens, it does not follow that all noncitizens are terrorists; however, this is exactly the conclusion that many policy makers appear to be drawing from the characteristics of the terrorists. To the extent that Congress is concerned about baggage screeners being a security risk, background checks and security measures should be taken; however, all employees should have to pass the same background checks.

The irony of Congress' recent decision is that the same legal immigrants who cannot be baggage screeners are required to register for our military draft if they are male and between the ages of 18 and 25, and all the legal immigrant baggage screeners who will be fired from their jobs could today sign up and serve in our National Guard (who are stationed at many airports for security purposes) and in our active military branches. In fact, many legal immigrants have served and do serve in our military, and many have died protecting the national security of this country.

The road to Latino immigrant integration is made much harder when government makes sweeping and erroneous conclusions about immigrants. Federal, state, and local governments must slow down and do a better job of determining what, in fact, are needed steps to fight terrorism, and reject the misconception that all immigrants are terrorists or suspected terrorists.

Endnotes

[1] In this article, the terms "Latino" and "Hispanic" are used interchangeably.

[2] U.S. Census Bureau, Census 2000, Profile of General Demographic Characteristics for the United States: 2000 <*www.census.gov*> (visited Aug. 13, 2001).

[3] *See* U.S. Census Bureau, Foreign-Born Population by Sex, Citizenship Status, Year of Entry, Hispanic Origin, and Race: Mar. 2000 <*www.census.gov/population/socdemo/hispanic*> (visited Nov. 12, 2001); U.S. Census Bureau, Population By Sex, Age, Hispanic Origin, and Race: Mar. 2000 <*www.census.gov/population/socdemo/hispanic*> (visited Nov. 12, 2001).

[4] For a brief review of the historical discrimination in U.S. immigration laws, *see* U.S. Commission on Civil Rights, *The Tarnished Door: Civil Rights Issues in Immigration*, at 7-12 (1980).

[5] Public Law No. 104-208, div. C, 110 Stat. 2009 (1996) (codified in scattered sections of 8 and 18 U.S.C.).

[6] Public Law No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

[7] *See* Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction – Statutory Restrictions and Constitutional Rights*, Interpreter Releases, at 245-254 (1997) ("*Federal Court Jurisdiction*").

[8] *Id.*

[9] *Id.* at 253; *see also* Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, Interpreter Releases, at 209 (1997) ("*Detention and Related Issues*").

[10] *Federal Court Jurisdiction* at 253; *Detention and Related Issues* at 216.

[11] *Detention and Related Issues* at 214-15.

[12] Nancy Morawetz, "Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms," 113 *Harvard Law Review* 1936, 1939-40 (2000) ("Understanding the Impact").

[13] *Id.*

[14] *See, e.g.*, Nancy Morawetz, "Rethinking Retroactive Deportation Laws and the Due Process Clause," 73 *New York University Law Review* 97 (1998); Paige Krasker, Note, "Crimes of the Past Revisited: Legal Aliens Deported for Past Crimes Under the Retroactive Application of the Antiterrorism and Effective Death Penalty Act," 22 *Suffolk Transnational Law Review* 109 (1998); Bruce R. Marley, Comment, "Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents," 35 *San Diego Law Review* 855 (1998); and Anjali Parekh Prakash, Note, "Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes," 72 *New York University Law Review* 1420 (1997).

[15] Understanding the Impact at 1938, 1954.

[16] *Id.* at 1950-1954.

[17] U.S. Census Bureau, Foreign-Born Population by Sex, Citizenship Status, Year of Entry, Hispanic Origin, and Race: Mar. 2000 <*www.census.gov/population/socdemo/hispanic*> (visited Nov. 12, 2001).

[18] Immigration and Naturalization Service, *1998 Statistical Yearbook of the Immigration and Naturalization Service* <*www.usdoj.gov*> (visited Nov. 13, 2001).

[19] *Id.*

[20] *Id.*

[21] U.S. Census Bureau, Latin American Foreign-Born Population by Sex, Age, and Region of Birth: Mar. 2000 <*www.census.gov*> (visited Nov. 13, 2001).

[22] One author estimated that 2.5 to 3 million noncitizen Latinos were eligible to apply for citizenship in 1996, but acknowledged, at the time his book was published in 1996, that about 2.6 million more Latino immigrants were about to be eligible through various legalization programs. Louis DeSipio, *Counting on the Latino Vote: Latinos as a New Electorate*, at 131 (1996) ("*Counting on the Latino Vote*").

[23] *Id.* at 124.

[24] *Id.* at 130.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 135.

[29] *Id.* at 127.

[30] *Id.* at 144.

[31] *Id.* at 145-148.

[32] *Id.* at 147.

[33] Immigration and Naturalization Service, *1998 Statistical Yearbook of the Immigration and Naturalization Service*, Table 44.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Counting on the Latino Vote* at 148.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 149.

[42] *Id.*

[43] U.S. Census Bureau, *Voting and Registration in the Election of November 1990* (1991); U.S. Census Bureau, *Voting and Registration in the Election of November 1994* (1996); U.S. Census Bureau, *Voting and Registration in the Election of November 1998* (2000) ("*Voting 1998*").

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See* U.S. Census Bureau, *Voting and Registration in the Election of November 1996* (1998) ("*Voting 1996*"). The Census Bureau has not released the results from the 2000 Presidential election yet.

[48] *Voting 1998.*

[49] *Id.*

[50] *Voting 1996.*

[51] *Id.*

[52] U.S. Census Bureau, *Language Use and English Ability, Persons 5 Years and Over By State: 1990 Census <www.census.gov>* (visited Nov. 28, 2001).

[53] *Id.*

[54] U.S. Census Bureau, Census 2000 Supplemental Survey Summary Tables *<http://factfinder.census.gov>* (visited Aug. 7, 2001).

[55] 42 U.S.C. § 1973b(f)(1) (2000); Congress, at the time of amending the Voting Rights Act to protect language minorities, limited the protection to persons who are "American Indian, Asian American, Alaskan Natives, or of Spanish heritage." 42 U.S.C. § 1973aa-1a(e).

[56] 42 U.S.C. § 1973aa-1a (2000).

[57] U.S. Commission on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election*, at 128-131 (June 2001) (Advance Copy).

[58] *Id.* at 129.

[59] *Id.*

[60] *Id.*

[61] The facts set forth in this article are taken from the amended complaint filed by MALDEF in federal district court. The lead attorney on the litigation for MALDEF is Maria Valdez, Senior Litigator, in MALDEF's Chicago office.

[62] To write this section, the author relied on testimony filed by Nina Perales, Staff Attorney in the MALDEF San Antonio office, with the Texas State Democratic Caucus Special Committee on Election Reform in May 2001.

[63] *See Reynolds v. Sims*, 377 U.S.C. § 533 (1964); *Wesberry v. Sanders*, 376 U.S.C. § 1 (1964); *Baker v. Carr*, 369 U.S.C. § 186 (1962).

[64] 42 U.S.C. § 1973, as amended (2000).

[65] Mexican American Legal Defense and Educational Fund *et al.*, *The Impact of Redistricting in Your Community: A Guide to Redistricting*, at 18 (2001).

[66] *Id.*

[67] *Id.* at 28.

[68] *See* Juan Andrade and Andrew Hernandez, *The Almanac of Latino Politics 2000*, at 24 (1999).

[69] *Id.* at 25.

[70] *Id.* at 23.

[71] *Id.*

[72] U.S. Census Bureau, *Difference in Population by Race and Hispanic or Latino Origin, for California: 1990 to 2000 <www.census.gov>* (visited Nov. 28, 2001).

[73] *Id.*

[74] U.S. Census Bureau, *Difference in Population by Race and Hispanic or Latino Origin, for Texas: 1990-2000 <www.census.gov>* (visited Nov. 28, 2001).

[75] *Id.*

[76] Public Law No. 107-71 (2001).

Chapter 10

Voting Rights

by Armand Derfner

Introduction

Since the U.S. Supreme Court decided that George W. Bush would be President of the United States, everyone has been talking about voting but, as with the weather, no one has done much. Voting is said to be fundamental to our nation, but until the 2000 elections we didn't seem to understand how rickety our election process is.

We know that in our federal system voting is administered by states, each one having different systems of casting and counting votes. But it goes deeper, as we saw in November and December. Voting is actually administered by counties (3000 nationwide), and takes place at precincts (several hundred thousand) where it is administered by Volunteer-Managers-for-a-Day (more than a million all told). The differences we saw in Florida between how votes are cast, counted, and miscounted by voters and officials in different precincts — let alone different counties — are not news. They can never be eliminated entirely but in the past they have been tolerated far too much.

Small wonder that in such a system ascertaining the will of the people would not be easy even if everyone were pulling for an honest deal and a fair count and if we all shared the same vision of what that meant. But of course we don't. Therefore, working to improve our election system requires two focuses: (1) streamlining the system across-the-board, and (2) making the system fair to all voters and segments of voters.

The federal government has a wide role to play in all this. Its power derives from several sources, some of which are: (1) power to enforce constitutional guarantees, especially equal protection and due process; (2) plenary power over federal elections; and (3) ability to spend money and offer money to states on certain conditions. The responsibility belongs to the executive branch directly, as well as in seeking legislation, and in litigating before the judiciary.

I. Redistricting

The federal government should play an active role in shaping redistricting law to protect minority voters.

Since the recent release of 2000 census figures, most governmental units in the United States are actively engaged in redrawing their district lines. Time is short. Every state will have congressional elections in 2002, and most will also have state legislative elections at the same time. Therefore, with a few exceptions (such as states that have only a single U.S. congressman, or states whose legislative elections do not take place in 2002), each state will need three separate state redistricting plans. Some states also use districts to elect other statewide officials such as judges or highway commissioners. Below the state level, innumerable cities, counties, school districts, water districts, and other governmental units are engaged in the same process, with the same 2002 elections facing most of them.

The direct federal role in redistricting is limited. District lines in each state are drawn by state bodies, and lawsuits over such lines are traditionally brought by private citizens and defended by state agencies. However, the Justice Department is armed under sections 2 and 5 of the Voting Rights Act to oppose racial or other minority discrimination in districting plans. Both these sections will be discussed more generally below, but at this point it is enough to say that the Department has played and can play a major role in achieving districting fairness through active use of section 2 and section 5.

- *Section 2* allows the Justice Department (as well as any private citizen) to file suit against any voting practice or procedure (including a redistricting plan) that has the purpose or result of discriminating on account of race. Such suits may be brought in any state, and in fact have been brought not only on behalf of black voters in the South, but also on behalf of Hispanic voters and American Indians.

- *Section 5* requires that in certain states and portions of other states all voting changes (including redistricting plans) must be sent to the Justice Department for "preclearance" before they can be implemented. This is an expeditious screening process in which the submitting jurisdiction has the burden of showing the change does not have a racially discriminatory purpose and will not have a discriminatory effect. If this showing is not made, the Department "objects" and the change is blocked. The greatest application of section 5 is in the South.

Since *Baker v. Carr* in 1962, the courts have gone through three generations of redistricting law. In the 1960s there was a drive for mathematical equality, creating the rule of one-person one-vote. In the 1970s the courts began striking down plans that were found to dilute the votes of minority voters — sometimes through districts that were racially gerrymandered, and more often through using at-large elections to avoid districting altogether. In the 1990s the Supreme Court created a new body of redistricting law designed to protect white voters.[1]

The issue in this decade will be how to reconcile these mandates, and here the role of the Justice Department is critical. The Supreme Court cases following *Shaw* have developed a somewhat shifting and ill-defined body of law, mostly in examining plans drawn before *Shaw* was decided.[2] The new plans will be the first widespread efforts to apply the new jurisprudence, and the cases will likewise be the first to review a generation of post-*Shaw* plans.

The question is whether the new plans will seek to protect minority voters from vote dilution. The *Shaw* cases do not end the need to avoid minority vote dilution, nor do they bar use of race as a factor in creating district lines. The most recent North Carolina case upheld a congressional districting plan that took account of race in drawing lines to avoid minority vote dilution. The Court indicated that taking account of race is likely to be inevitable, and that it does not invalidate a plan without evidence that race was the predominant concern over and above politics or other "traditional state criteria."[3]

The Justice Department should vigorously bring suits under section 2 and deny preclearance under section 5 to plans that dilute minority voters' votes. Moreover, the Department should seek to join cases as amicus curiae where significant issues under *Shaw* arise. This amicus role is not new. The Department played a crucial role in arguments before the Supreme Court in the 1950s cases that first shaped redistricting law. So important were these cases that arguments were presented not only by Solicitor General Archibald Cox, but also by Attorney General Robert F. Kennedy, who chose the Georgia county unit system case as the occasion for his first and only Supreme Court argument.[4]

We are at a crossroads. How districts are drawn in thousands of city, county, and state bodies will test whether we mean to include everyone in our democracy. There is significant pressure to abandon the quest for fairness to minority voters. The Department of Justice needs to lead the defense against that pressure.

II. Section 5

The Department of Justice should vigorously enforce section 5 of the Voting Rights Act.

The federal government's most prominent executive function relating to voting is its enforcement of section 5 of the Voting Rights Act, which requires preclearance of voting changes in various states, mostly southern. The Voting Rights Act, first passed in 1965 and extended several times since then, has been called the most successful civil rights law ever passed. It has had at least three lives. Its first and most electrifying success was in section 4, which — almost overnight — ended generations of outright disfranchisement of black voters throughout the South.[5,6]

It took only a few years for black registration to swell. Once black voters could no longer be kept away from the polls, however, new tactics arose, commonly grouped under the heading of vote dilution. And here the genius of section 5 came into play. Section 5 was a preventive response to the massive resistance described by Mississippi Governor J.P. Coleman, who said that any southern legislature could pass new laws faster than federal courts could strike them down. Previous laws had foundered; southern states simply ran around them by adopting new schemes. In section 5, Congress stopped trying to play "catch-up" and said in effect, "We don't know what tactics you will try, but we know you will try something and when you do we will be ready for you ahead of time."

Thus section 5 created a novel procedure by which any voting change in a "covered" jurisdiction[7] was blocked and could only be put into effect if the jurisdiction showed the change had no discriminatory purpose or effect. Thus, the burden was shifted from the voter to the jurisdiction in two ways: procedurally, because the preclearance requirement was automatic so the jurisdiction had to make the necessary showing without anyone having to file a suit, and substantively, because the jurisdiction had the burden of proving non-discrimination rather than the voter having to prove the opposite.[8]

Section 5 has been an extraordinarily successful prophylactic. It has been applied in numerous types of voting changes, including such changes as new election methods, shifting polling places and many others — but most notably redistricting. In recent years the number of submissions has mushroomed, especially after each decennial census when redistricting plans are submitted by states, counties, cities, school boards, hospital and water districts, etc. Much of the business has involved redistricting.

In the first several years, most section 5 submissions related to restrictions on the right to register and vote. That changed after a 1969 Supreme Court decision that brought within the ambit of section 5 any change that could affect a person's vote in the slightest, and that recognized that a voter could be injured by vote dilution as well as by outright denial.[9] Therafter the number of submissions mushroomed, and vote dilution as a concern came to the forefront. It is no exaggeration to say that the administrative process of section 5 and the presence of an agency developing expertise helped rapidly develop a jurisprudence of vote dilution.

Section 5 has not only blocked outright efforts to discriminate; it has helped ensure that jurisdictions making voting changes pay close attention to ensure fairness. It plays a fundamental role in preventing vote dilution, and the Department of Justice must continue to enforce it vigorously in line with its important purposes.

III. Expiration of Section 5

The Department of Justice should prepare for 2007.

Section 5 of the Voting Rights Act, originally passed for 5 years, has been extended in 1970, 1975, and 1982, the most recent time for a period of 25 years through the year 2007. What will happen in 2007?

Each time section 5 has come up for expiration or renewal, there have been those who said it was no longer needed and should be ended. Although the burden of compliance by covered jurisdictions is not great, the concept of singling out some states for a special procedure has created strong pressures against its continuation. In 1982, these pressures were overcome by presentation of an extensive record in hearings before U.S. House and Senate Committees of continued abuses necessitating extension. A devastating cartoon in a Birmingham newspaper showed a herd of sheep in the foreground with a pack of wolves just beyond, while the shepherd tells the guard dog, "You've done a good job; I guess we won't be needing you any more."

It is too early to tell now whether section 5 should be extended again or not when 2007 arrives. Two things need to be done, though. First, of course, the Department of Justice needs to be keeping a careful record as it administers the statute. Second, no matter what happens in 2007, vote dilution will not have ended, nor will the difficulty of using the court system to combat vote dilution. Therefore, if there are valid arguments in 2007 against simply extending section 5, there needs to be something in place as a substitute weapon again vote dilution. Those who expect to advocate an end to section 5 in 2007 will be called on to tell us what will replace it, and it is not too early to begin developing a permanent and universal system today. The Department of Justice should do so.

IV. Section 2

The Justice Department should litigate vigorously under section 2.

Section 2 of the Voting Rights Act came about because of an aberrant decision by the Supreme Court in the *City of Mobile* case.[10] In that case, the Court turned its back on its own jurisprudence and held that vote dilution could not be proved except by specific proof of discriminatory intent.[11] Editorial writers around the country were properly brutal in ridiculing the Court's opinion. One editorial, referring to the fact that the Mobile plan was more than a century old, said, "It would be a good trick to subpoena the legislators from their graves."

Congress likewise was moved to action. Because the Supreme Court's straitjacketed interpretation of the 14th and 15th Amendments could not be changed by Congress, that body instead executed its constitutional authority to enforce voting rights by amending section 2 of the Voting Rights Act. That section, which had originally followed the language of the 15th Amendment, was now amended to include an explicit "results" test, which remains in the statute today.[12]

As discussed above, the Justice Department has filed suit under section 2 in a number of redistricting cases, and it is recommended that this activity should increase. However, it is not only districting cases that call for section 2 treatment. Indeed, the Supreme Court's decision in *Bush v. Gore* creates a new mandate for applying section 2. That mandate will be discussed below in connection with the discussion of that case.

V. Other Voting Rights Authority

The Department of Justice should initiate litigation under other voting rights statutes.

In 1939, then-Attorney General Frank Murphy asked attorneys in the Department of Justice to examine whether there was any civil rights enforcement authority in existing federal law. This led to the revival of several long-dormant Reconstruction-era statutes, which were used to bring criminal civil rights prosecutions like the *Screws* case and later the Neshoba County, Mississippi, murders.

Today it is appropriate again to look at the U.S. Code for statutory authority that the Department of Justice may use to seek voting rights and voter equality.

Of course there is section 2 of the Voting Rights Act, which bars voting practices that discriminate on account of race in purpose or result. This section has been used in many situations to attack practices that are "fair in form but discriminatory in operation" — like the fabled offer of milk to the stork and the fox.[13]

A possible list of other federal statutes would include two sections of the 1964 Civil Rights Act, one section of the Voting Rights Act of 1965, and one section of the National Voter Registration Act:

- Section 101 of the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A), enacts what was known as the "freezing principle," by providing that no state or local official may apply differential standards or procedures in determining voter qualifications.

- Another subsection of section 101, 42 U.S.C. § 1971(a)(2)(B), enacts a "materiality" rule in providing that no one may be prevented from voting because of an error or omission that is not material in determining the voter's qualifications.

- Section 10(a) of the Voting Rights Act, 42 U.S.C. § 1973i(a), makes it illegal to fail or refuse to permit any qualified person to vote.

- Various portions of section 8 of the National Voter Registration Act, 42 U.S.C. § 1973gg–6, regulate the grounds and methods of removing voters' names from the registration list.

While these sections may not reach as far as section 2 of the Voting Rights Act in addressing subtle discrimination that is uniform on its face, they are powerful weapons because the proof requirements are straightforward. In effect they provide strict liability. Moreover, each of them applies to all elections — federal, state, and local — except for the NVRA, which applies only to federal elections. The Department of Justice has specific statutory authority to bring suits under each of these sections.[14] Finally, their potential scope is quite broad because of the definition of vote or voting:

> *The term 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to [the Voting rights Act], or other act required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.*[15]

Overall, Congress has given the Department of Justice broad authority to ensure that the right to vote is real and fair.[16]

VI. *Bush v. Gore*

The Department of Justice, the Federal Election Commission, the U.S. Commission on Civil Rights, and other arms of the federal government should move forward to apply the lessons learned in the 2000 Presidential election.

Just adding to the chorus of opinions about the 2000 elections is not the purpose here. Rather the purpose is to see how the administration can help us make improvements.

The 2000 Presidential election, especially the events in Florida, taught us that we have a Model T election system, and also taught us some subsidiary lessons, including:

- The problems we saw in Florida are widespread throughout the nation.
- They harm everyone; for example, an estimated 2 million Presidential votes went uncounted because of undervotes or overvotes.
- They often harm poor and minority voters disproportionately.
- They violate the Constitution, according to the U.S. Supreme Court.

Attention has focused on the most obvious category of problem, the different methods of casting and counting ballots. "Punchcards" of various kinds appear to be the biggest culprits, and their elimination is the most evident and widespread change taking place (as recommended by the Federal Election Commission more than a decade ago). But that should not be the end of change.

A host of other problems occurred or are said to have occurred in Florida. Other kinds of voting machines had operating or counting problems. Registration lists at polling places were inaccurate. Lists of voters disqualified for felony conviction were inaccurate, causing some voters to be illegally rejected while others were allowed to vote despite convictions. Polling place officials could not reach central offices to solve disputes about eligibility.

Well, guess what? These problems happen all the time in American elections, in every state. They hurt all voters, and all voters have a stake in devoting the resources to provide the necessary technology and training for officials in order to minimize the error rate.

The problems are aggravated because they are not necessarily evenly distributed. Wealth, political partisanship, and race play parts in how the problems are distributed. Wealthier counties can better afford to spend money on modern voting machines. In Florida, the State created a computer program that could be accessed by laptop computers to resolve eligibility disputes on the spot, but only the wealthier counties bought them, while poorer counties were left with the futile (but traditional) method of trying to use the one available telephone to call the always busy central registration office. In one county registration officials saw errors on absentee ballot request forms, and alerted Republicans (but not Democrats) who then came in and corrected them. At least 8000 voters, mostly black, were erroneously disqualified by a process designed to purge convicted felons (apparently carried out at the polling places on Election Day rather than well beforehand as typically required of all purges — with the voter receiving ample notice and opportunity to challenge errors).

A number of states have begun to study their election processes and make legislative changes. A common problem so far seems to be an unwillingness to spend the necessary money. For example, Georgia has passed a reform bill — with no funding. South Carolina appointed a commission that recommended numerous changes — but the General Assembly skipped the most important and expensive ones.

Private lawsuits have been brought in several states, generally seeking reform that is both across-the-board and seeks to eliminate inequalities of every kind.

The Supreme Court in the *Bush v. Gore* decision appeared to set new standards for electoral equality. "Having once granted the right to vote on equal terms, the State may not by later arbitrary and disparate treatment, value one person's vote over that of another."

There have been no Supreme Court or lower court decisions since to explain how far this rule goes. Specifically, the question is whether this mandates an equal opportunity *statewide* to cast effective ballots. The Court's opinion contains some language giving room for local differences but not on the basis of wealth. "The question before the Court is not whether local entities *in the exercise of their expertise* may develop different systems for implementing elections." Instead, the Court said, it was the actions of a state agency — in this case a court — "with the power to assure uniformity" that did not provide equal treatment.[17]

If the Supreme Court retreats from the strong equal protection position it took in *Bush v. Gore*, that will put the decision into the class — as a former Justice described an earlier case — of "a restricted railroad ticket, good for this day and train only."[18]

The federal government can help ensure that does not happen.

The Department of Justice can and should participate in litigation to bring about statewide uniformity in each state. The pattern is not new. Even after the U.S. Supreme Court rejected a federal right to statewide equal education opportunity, many states have acted to secure such a right, either by state legislative action or by state court decisions. The Department of Justice has the statutory authority, as explained above, to press such a litigation program.

In addition, other agencies, such as the Federal Election Commission[19] and the U.S. Commission on Civil Rights, have important information-gathering and -exchange functions. They can help the states achieve equality among their voters.

VII. Congressional Action to Improve Registration and Voting

The administration should seek legislation to require minimum standards, accompanied by federal funding if necessary.

The Constitution gives Congress virtually plenary power over federal elections. Through exercise of this power Congress in a practical sense controls all elections, because the power over federal elections includes regulation of all elections conducted at the same time and place as the federal elections — i.e., state offices on the same ballot as congressional elections in November of even-numbered years. States may theoretically have two election systems, but the cost is high and would undoubtedly spur voter revolt.

Whereas the Civil Rights Acts and the Voting Rights Act were based largely on Congress' power to enforce the 14th and 15th Amendments, other statutes, mainly the NVRA, have been based on Congress' power over federal elections. Congress could act likewise to ensure minimum standards and statewide equality in election procedures. If needed, Congress could also authorize appropriations to help the states carry out the new federal equal standards. (Unlike exercise of the spending power, the states would not have the choice of ignoring the substantive provisions of the law by rejecting the money.) This does not necessarily mean the same standards in each state, but the same standards within each state.

State and local control over elections is an American tradition. The Supreme Court overrode that tradition. If that decision is to bring reform rather than simply deciding one political election, it is time to follow up with federal legislation to set minimum standards.

VIII. Conclusion

There has never been a better time to improve our Model T system that needs so much improvement. We trail all the world's democracies (and many of the dictatorships) in voting participation. People who are poor and minority bear the special brunt of the problems, but everyone pays a heavy price. The administration can lead the way to bringing real democracy and a truly republican form of government to the United States.

Endnotes

[1] These cases are commonly known as *Shaw* cases, after the case that first began the doctrine, *Shaw v. Reno*, 509 U.S.C. § 630 (1993). The author believes this is a fallacious and ephemeral jurisprudence, reflecting little more than Justices' and judges' attitudes of white supremacy, ranging from slick to crude. This chapter, though, deals with the world as it is.

[2] The first decision in *Shaw v. Reno* created a cause of action for voters to challenge the use of race as a factor in redistricting, without requiring a showing of injury or intent to injure. Later cases have developed the (often-shifting) standards for liability in such cases; the current rule is essentially that race may be a factor as long as it does not overcome "traditional" redistricting principles such as incumbent protection. The main examples of cases reviewing plans drawn after — and in light of — *Shaw* is the set of North Carolina cases following *Shaw v. Reno* itself. There have been three, in which the Supreme Court has reversed the lower court three straight times. *Shaw v. Hunt*, 517 U.S.C. § 899 (1996), *Hunt v. Cromartie*, 526 U.S.C. § 541 (1999), *Hunt v. Cromartie*, 532 U.S.C. § 234 (2000).

[3] *Hunt v. Cromartie*, 532 U.S.C. § 234 (2000).

[4] On Jan. 17, 1963, Attorney General Kennedy argued as amicus in *Gray v. Sanders*, 372 U.S.C. § 368 (1963). On four days in Nov. 1963 Solicitor General Cox argued the four cases that included *Reynolds v. Sims*, 377 U.S.C. § 533 (1964).

[5] The main engine of enfranchisement was the suspension of literacy tests across the South, enforced by taking registration out of the hands of local registrars where they would not comply. The 1965 Act also hastened the end of the poll tax in the last few states where it still existed. After suspension of literacy tests in the South did not bring the world to an end, the experiment was made permanent and universal when the 1970 extension of the Act ended literacy tests everywhere.

[6] The Voting Rights Act was the fourth modern attempt to end disfranchisement of black voters. The Civil Rights Acts of 1957, 1960, and 1964 targeted specific disfranchising schemes but produced little change. The sweeping approach of the Voting Rights Act of 1965 was born out of frustration at the failure of these earlier efforts.

[7] The coverage formula or "trigger" swept in states or parts of states that used literacy tests *and* that had low voter turnout rates in 1964, which formed the basis for a presumption that the literacy tests were discriminating. (All literacy tests nationwide were suspended by Congress in 1970 and banned permanently in 1975).

[8] In fact there have had to be a few suits to enforce section 5, but the only requirement in such suits is proof that a voting change has occurred. When that is proved, usually a simple matter, the suit is ended and the change is unenforceable without preclearance.

[9] *Allen v. State Board of Elections*, 393 U.S.C. § 544 (1969).

[10] *Mobile v. Bolden*, 446 U.S.C. § 55 (1980).

[11] The leading case ignored by the Supreme Court was *White v. Regester*, 412 U.S.C. § 755 (1973). The *Mobile* opinion listed *White* as a prior consistent case that had held proof of discriminatory purpose was essential to find at-large elections violate the 14th Amendment. Plainly, *White* did no such thing.

[12] Ironically, as the 1982 extension of the Voting Rights Act, including section 2, was roaring down the track to enactment by lopsided votes in both houses of Congress, the Supreme Court moved to take some of the sting out of the *Mobile* decision by deciding *Rogers v. Lodge*, 458 U.S.C. § 613 (1982). In that case, a majority of the Court struck down at-large elections in Burke County, Georgia, on evidence that was almost a carbon copy of that which was found insufficient in Mobile, Alabama. If the New Deal Supreme Court could read the election returns, this Court could read the editorials.

[13] The Aesopian reference and the quotation come from Chief Justice Burger's opinion in *Griggs v. Duke Power Co.*, 401 U.S.C. § 424 (1971), which invalidated discriminatory tests and employment requirements under Title VII of the Civil Rights Act of 1964.

[14] *E.g.*, 42 U.S.C. § 1971(c), 42 U.S.C. § 1973j(d).

[15] 42 U.S.C. § 1973l(c)(1). The definitions in the other statutes have small wording differences.

[16] It is unclear whether the Department of Justice has authority to bring suits to enforce 14th or 15th Amendment rights apart from the specific grants of authority to enforce particular statutes. While these specific grants of authority would probably cover most suits the Department might bring, there may well be suits that would not fit, for example, a due process violation in a procedure that might not fit within the broad definition of voting. If the occasion arises, the Department should not hesitate to bring suit directly under the 14th or 15th amendment and have that general authority tested.

[17] The issue is reminiscent of the "statewide school funding" cases of the 1970s, which culminated in *San Antonio Independent School District v. Rodriguez*, 411 U.S.C. § 1 (1973). In that case a majority of the Supreme Court rejected claims that the equal protection clause required states to provide or fund equal education opportunities. Education, like voting, has been typically administered and funded locally, which means large differences between the opportunities found in rich versus poor areas. The Supreme Court in *Rodriguez* found no right to equal education opportunity, but said voting is different because the equal right to vote (although not the right to vote itself) is fundamental. *Bush v Gore* should also teach us that, because all state voters compete with each other in statewide elections, the state – which has the power to assure uniformity — cannot allow voters in one area of the state to buy better votes.

[18] *Smith v. Allright*, 321 U.S.C. § 649, 669 (1944) (Roberts, J., dissenting).

[19] Under 2 U.S.C. § 438(a)(10), the Federal Election Commission is specifically directed to "serve as a national clearinghouse for the compilation and review of procedures with respect to the administration of federal elections . . ."

Chapter 11

Affirmative Action in Public Contracting: The Final Years of the Clinton Administration

by Georgina Verdugo

1. *Adarand* and Its Aftermath

In 1995, the U.S. Supreme Court handed down *Adarand v. Pena,*[1] the landmark decision in which the Court chose to apply the most stringent level of judicial review — the strict scrutiny standard — to federal highway construction programs. This decision generated the most comprehensive review of federal affirmative action programs in history and led to the Clinton Administration's "Mend it, don't end it" policy.

Once again, the Court will consider *Adarand* in light of this strict scrutiny standard and could possibly impose the severest constraints on federal contracting programs in U.S. history. The impact of this decision could reach all federal affirmative action programs deemed "racial classifications" and could render them *fatal in fact*, thereby ending them. Thus, *Adarand v. Mineta* is the latest of a line of cases involving affirmative action in government procurement that could have far-reaching implications for programs designed to promote equal opportunity in employment, education, and other sectors as well.

In 1989, the Central Federal Lands Highway Division of the U.S. Department of Transportation (DOT) awarded the prime contract for a Colorado highway construction project to Mountain Gravel & Construction Company. Mountain Gravel solicited bids from subcontractors for the guardrail segment of the contract. Adarand Constructors, Inc., a specialist in guardrail work, submitted the lowest bid. However, Gonzales Construction Company, a certified small business owned and controlled by socially and economically disadvantaged individuals, also submitted a bid. Under the DOT's Subcontractor Compensation Clause (SCC), Mountain Gravel would receive a bonus if it hired subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals.

Adarand, a Colorado-based company owned by a Caucasian male, challenged the constitutionality of the SCC, alleging a violation of the Due Process Clause of the Fifth Amendment. Adarand sought declaratory and injunctive relief against any future use of the subcontractor clauses that he challenged. In *Adarand Constructors v. Skinner*[2] the District Court upheld the statutory provisions defining Disadvantaged Business Enterprise (DBE) and its goals program as constitutional, using the "intermediate level" of judicial review and relying upon *Fullilove v. Klutznick*[3] and *Metro Broadcasting Inc. v. FCC.*[4] The U.S. Court of Appeals for the 10th Circuit affirmed, using the intermediate scrutiny level of review and citing *Metro Broadcasting* and *Adarand Constructors v. Skinner.*[5]

The U.S. Supreme Court reversed the 10th Circuit's decision, holding that "all racial classifications imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[6] The Court remanded the case to the lower court for a determination as to whether the SCC was narrowly tailored to serve a compelling governmental interest. The Court (O'Connor, J.) articulated three considerations to be used to analyze the constitutional sufficiency of the racial classification at issue: skepticism, consistency, and congruence. "Skepticism" requires any racial characteristic to be inherently suspect. "Consistency" mandates a standard of review to be applied regardless of the race of the persons benefited or burdened. "Congruence" requires that the equal protection analysis under the 14th Amendment and the 5th Amendment's Due Process Clause be the same.

In his dissent, Justice Stevens argued that controlling precedent required the application of the intermediate scrutiny standard, citing *Metro Broadcasting* and *Fullilove*. He also criticized the Court's failure to acknowledge a difference between invidious discrimination and the benign use of race to promote equality. He wrote:

> *There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the government's constitutional obligation to "govern impartially" . . . should ignore this distinction.*[7]

The U.S. District Court for the District of Colorado, applying strict scrutiny, granted plaintiffs' motion for summary judgment.[8] The U.S. Department of Transportation appealed the decision of the district court, arguing that the court incorrectly found that the SCC program was not sufficiently narrowly tailored to a compelling governmental interest and therefore could not survive strict scrutiny. While the appeal of this decision was pending, the plaintiff filed suit against state officials, making the same arguments that the State of Colorado's use of the federal guidelines in certifying disadvantaged business enterprises violated the Constitution.[9]

The Colorado Department of Regulatory Agencies changed its certification program in response to the earlier district court decision and replaced it with a requirement that all applicants certify that each of their majority owners has experienced social disadvantage based on the effects of racial, ethnic, or gender discrimination. Using the revised standard, the agency certified Adarand as a DBE. Citing these events, the U.S. Court of Appeals held that the case was moot and vacated the district court's earlier decision.[10] Adarand filed a petition for *certiorari* seeking Supreme Court review. The U.S. Supreme Court held that the case was not moot and remanded it back to the lower court to apply its strict scrutiny standard to the merits of the case.[11]

On September 25, 2000, the court of appeals (Lucero, J.) upheld the DOT's program as revised, citing numerous congressional investigations and hearings as well as statistical and anecdotal evidence that showed that discrimination had prevented the formation of qualified minority business enterprises in the national subcontracting market. In so ruling, the court found that the federal government had a "compelling interest in not perpetuating the effects of racial discrimination in distributing federal funds or in remediating the effects of past discrimination in the government contracting markets created by its disbursements.[12] The court also found that while the SCC program in existence in

1996 was not narrowly tailored, the program as revised had removed the defects of the previous program and was narrowly tailored by requiring an individualized determination of economic advantage and eliminating the race-based presumption of economic disadvantage. The court considered other criteria as well, including the possible use of race-neutral means of facilitating participation, the limited duration of the race-conscious measures, program flexibility, the aspirational (vs. mandatory) nature of the goal, the burden on third parties, and whether the program was over- or underinclusive.

On March 26, 2001, the US Supreme Court granted *certiorari*, thereby agreeing to review the Circuit Court's decision. Oral argument will take place during the Court's 2001-2002 term beginning October 2001. The questions to be answered are: "1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination and 2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest."

The Supreme Court will decide whether the DOT's DBE program, which was revised since the 1995 decision, is constitutional when the strict scrutiny standard is applied. This case has far-reaching implications. The Court could rule on narrow grounds and send the case back to the 10th Circuit court of appeals to reconsider its decision, or it could further narrow the boundaries of acceptable federal affirmative action programs involving "racial classifications" even when intended to remedy centuries of discrimination.

DBE programs are necessary to open the doors historically closed to minorities and women. The barriers to opportunity in the construction industry were well documented when Congress enacted the Transportation Equity Act for the 21st Century (TEA-21) in 1998. As the 10th Circuit court of appeals indicated, the congressional record supporting this legislation showed that "informal, racially exclusionary business networks dominate the subcontracting industry, shutting out competition from minority firms."[13] For example, a Colorado Department of Transportation disparity study found that a disproportionately small number of women and minority-owned contractors participated in that state's highway construction industry; and more than 99% of contracts went to firms owned by white males.[14]

While minorities make up to 20% of the national population and own 9% of construction firms, they receive only 4% of construction receipts.[15] Non-minority construction companies receive 50 times as many loan dollars as African American-owned firms that have identical equity. Minority-owned firms receive only 61 cents for every dollar of work that white male-owned firms receive; women-owned firms receive 48 cents. While Jim Crow laws have disappeared, transportation construction continues to rely on the "Old Boy Network," which, until the past decade, was almost exclusively white. This network perpetuates itself because it is based on business friendships and relationships established decades ago, before minority-owned firms were allowed to compete.[16]

A Denver-based study showed that African Americans were 3 times, and Hispanics 1.5 times, more likely than whites to be rejected for business loans. Minority businesses are viewed as bad risks and less desirable. Thus, the legitimate capital needs of such businesses are ignored.[17] The average loan to a black-owned construction firm is $49,000 less than the average loan to an equally matched non-minority firm, and in Denver minority construction firms are three times as likely to be rejected.

Discrimination by private contractors, unions, and lenders has impeded the formation of qualified minority businesses in subcontracting. Prime contractors also have been found to refuse to employ minority subcontractors due to the unwritten rule of the "Old Boys" network. Prime contractors that resist working with minority subcontractors have also gone so far as to refuse to accept low minority bids or to share low bids offered by minority firms with nonminorities in order to help them undercut the bid. This is called "bid shopping."

A 1997 Urban Institute study found substantial disparity in government contracting.[18] It found that minority-owned businesses receive approximately 57% of the amounts they would be expected to receive based on the number of available, i.e., "ready, willing and able," minority-owned firms. These data apply for African American, Latino, Asian American and Native American groups and for women, who receive only 29% of the dollars they would be expected to receive based on their availability.[19] Disparities are greater in localities where no affirmative action programs are in place.

When DBE programs are eliminated, there is usually a sharp drop in minority and female business participation. For example, when the State of Michigan terminated its DBE program, minority participation fell to zero, while the federal program was able to maintain 12.7% participation.[20] Other examples cited by the U.S. Department of Transportation include Louisiana; Hillsborough County, Florida; Arizona; Arkansas; Rhode Island; and Delaware; where DBE participation on construction projects plummeted once the programs were eliminated. Other jurisdictions included Nebraska, Missouri, Tampa and Philadelphia.[21] In Colorado, after the federal district court held in *Adarand* that the DBE program was unconstitutional, significantly less highway construction work reportedly went to companies owned by minorities and women. While companies owned by blacks received slightly more work (up from zero in 1998 to 0.5%) Hispanic-, women-, and Native American-owned firms experienced a significant decline in participation. As a result, the Colorado Department of Transportation announced that it is embarking on an "aggressive effort to bring those numbers back up."[22]

Contracting is a closed network, with prime contractors maintaining longstanding relationships with subcontractors; so minority-owned firms are rarely used as subcontractors on projects that lack affirmative action requirements. For the above reasons, the compelling state interest — a required element of the strict scrutiny standard of review — in enacting and implementing a DBE program on the federal level is beyond dispute.

The DBE program is intended to "level the playing field" for qualified female- and minority-owned firms, not taking away contracts from low bidders. Therefore, while some have argued that the DBE program "results in white male contractors not receiving the contracts they would otherwise expect to receive," without those programs, minorities and women would lose the opportunity to compete.[23] According to congressional testimony, some non-minority contractors have accepted higher bids from other firms in order to avoid working with DBEs. Others testified that some general contractors "would rather lose money" than deal with female contractors.[24]

The Department of Transportation's regulations do not require prime contractors to accept higher bids from minority and female subcontractors. Moreover, the selection of subcontractors is not usually subject to low-bid requirements on the state and local levels. Other factors, including the experience of the prime contractor, the quality of the subcontractor's work, and the reputation of the subcontractor are also considered.[25] The DBE regulations merely require good faith efforts to achieve the DBE goals. Prime contractors do not have to ignore price or quality in the selection of minority or female subcontractors.

DOT's 10% goal in the DBE program is an "aspirational goal," not a quota or a "set-aside." The program specifically prohibits the use of quotas. The DBE goal is a national goal; it is not imposed on any state or locality. It is used to evaluate overall performance of the DBE program nationwide. If there is a precipitous drop in participation by DBEs, the department will evaluate its efforts to ensure nondiscrimination in DOT-assisted contracting opportunities. State agencies are allowed to waive goals when they cannot achieve the goal on a particular contract for a specific year.[26] The flexible goals contained in the DBE program are tied to the availability and capacity of firms in the local market. Lastly, the standard for compliance is *good faith effort*. As the 10th Circuit Court stated, race-neutral means to eliminate discrimination in this industry were used by Congress for years, and only after Congress continued to find discriminatory effects did it implement a race-conscious remedy. Hence, the goal included in the department's DBE program has ample justification, as a matter of both constitutional law and sound public policy.

While the program permits a presumption of economic disadvantage, the DOT added a net worth cap of $750,000. Thus, regardless of one's race, gender, or the size of one's business, a person whose personal net worth exceeds $750,000 is not deemed economically disadvantaged and is ineligible to participate in the program. Applicants will have to submit a personal net worth statement and supporting documentation with their applications.[27]

The presumption of disadvantage contained in this revised program is based on well-documented history of racial and gender exclusion in the contracting industry and is therefore sustainable as a matter of law. Non-minority males who can demonstrate that they are socially or economically disadvantaged may participate in the DBE program. Moreover, according to the DOT, businesses owned by white males have qualified for DBE status.[28] The presumptions of social and economic disadvantage are rebuttable, and if a state/recipient or third party demonstrates that there is a reasonable basis to conclude that an individual is not disadvantaged, the presumption may be removed.

The DOT's program is also narrowly tailored. As the 10th Circuit Court observed, the current regulations require that recipients (states) must "meet the maximum feasible portion" of their overall goal by using "race-neutral means of facilitating DBE participation." The DBE regulations list a number of race-neutral means available, including assistance with bonding and financing barriers, establishing a program to assist new start-up firms, assisting DBEs to develop their capacity to use emerging technology, and technical assistance.[29] Recipients are not required to have contract goals on each contract, but to use goals only for any portion of the overall goal that they cannot meet through race-conscious means.

The program has built-in flexibility; recipients set their own goals based on local conditions. Recipients also develop their own methods for setting goals and any contract may be waived entirely if the prime contractor shows that it made good faith efforts but could not meet the goal. The TEA-21 legislation also provided for an end date of 2004, unless reauthorized by Congress.

The DBE program affects a small percentage of total federal contracting dollars awarded by the Department of Transportation. In fiscal year 2000, only 7% of the prime contracts and only 2% of the federal dollars awarded went to DBEs.[30]

As it was intended to remedy the effects of past discrimination, and as it is constructed, the program does not unduly impinge upon the rights of third parties. The revised regulations also require that DBEs not be so overconcentrated that they unduly burden the opportunity of non-DBEs to participate.[31]

II. The Importance of Minority Business: The Milken Report

The importance of minority and women business to the United States economy was documented in a report issued by the Milken Institute and the U.S. Department of Commerce's Minority Business Development Agency (MBDA) in September 2000. This report, "The Minority Business Challenge: Democratizing Capital for Emerging Domestic Markets," found that the economic growth of the nation cannot be sustained without the inclusion of minority business. It also found that "Absent broad-based institutional investor participation in minority and immigrant business communities — soon to be the new majority of businesses — continued growth in the American economy is impossible, affecting not just minority businesses but putting the nation's macro economy at risk."[32] Minority firms are surpassing the growth of majority-owned firms and are growing at a rate of 17% a year, six times the rate for all firms. Minority firms' sales are also growing at a faster rate than majority firms: 34% per year or more than twice the rate of all firms.[33] However, minority firms receive only 2% of all private equity investments and 3% of all Small Business Investment Company investment funds.[34]

This underinvestment in minority business also limits employment growth. Minorities account for 70% of the growth in the U.S. workforce and minority firms, as with other entrepreneurs, are an important source of job, income, and wealth creation. The report warns that without minority labor force participation, "labor shortages will become acute, further limiting productivity and growth." Access to capital for minority-owned firms is therefore vital for the healthy development of this growing sector of American businesses.[35]

The role of minority entrepreneurs is also becoming increasingly important as demographic indicators suggest the growth of a disproportionately majority retired population, which will be dependent upon a workforce that is becoming increasingly diverse. As a result, minorities and women are becoming a critical segment of the economy and institutional investors must invest in firms owned by these groups in order to meet the high yield returns necessary to support the aging "Baby Boomer" population.[36] The report also suggests that investing in minority communities will also foster "bridgeheads" into the global markets.[37] The report recommended that there be "greater enforcement of minority procurement programs" as well as more innovative financial instruments to expand the pool of domestic and international capital investment in minority business, training and mentoring programs to create more minority venture capitalists and tax and other incentives for investment in minority businesses.[38]

III. Conclusion

The Clinton Administration and the Department of Transportation, led by Secretary Rodney Slater, are to be commended for their valiant efforts to preserve affirmative action in federal contracting since the Supreme Court's decision in

Adarand v. Pena. Since the days when former Representative Parren J. Mitchell (D-Md.) attached an amendment to President Carter's $4 billion Public Works Bill to set aside 10% of state, county, and municipal funds to hire minority companies as contractors and subcontractors, Congress and both Democratic and Republican administrations have tried to open the doors of opportunity to those historically excluded from federal contracting programs. The effort to integrate the construction industry, the last bastion of the proverbial "Old Boys" network that has profited handsomely from billions of dollars in federal aid projects, has met with relentless opposition since the 1970s. Organizations including Associated General Contractors of America are constantly challenging the legal standing of minority and women's DBE programs. One might ask, "Why the intense opposition to leveling the playing field? What are they afraid of?"

Surely there is enough federal highway construction money to go around. Moreover, the demographic data released by the Census Bureau tells us that America is quickly becoming more racially and ethnically diverse. If the federal government is to be able to serve the taxpayers' need for new highways, bridges, airports, and other transportation projects, it will have to reach out and include those men and women who have been systematically excluded from the construction industry. We simply cannot afford to have these projects remain the exclusive domain of the "Old Boys" club, which perpetuates itself by family and business relationships created long before minority and women-owned firms were allowed to compete. Perhaps these "Old Boys" are afraid of the future, but the future is here.

IV. Recommendations

The Bush Administration must continue the bipartisan legacy of protecting and advancing opportunities for minority and women-owned firms to contract with the federal government.

Standing alone, legislation that simply proscribes racial discrimination is an inadequate remedy, said the Clinton Justice Department.[39] Then-Senator Bob Dole once said that "one of the most important steps this country can take to ensure equal opportunity for its Hispanic, black and other minority citizens is to involve them into the mainstream of our free enterprise system."[40] In order to achieve this result, the government must continue to attack the deliberate, overt, and subtle barriers that have excluded minorities and women from obtaining contracting opportunities in both government and the private sector. Judge Lucero said, "Without affirmative action in its procurement, the federal government might well become a participant in a cycle of discrimination." The Bush Administration has indicated some support for the DOT's Disadvantaged Business Enterprise program as evidenced by its Supreme Court brief in the *Adarand* case.[41] This is an encouraging first step. It is hoped that as the administration continues its first term, it will indisputably demonstrate its commitment to the law and principles of equal opportunity and affirmative action. Otherwise, this Bush Administration will simply be a passive participant, and "Affirmative Access" will have no meaning.

The administration must support and enforce laws that promote equal opportunity and affirmative action in employment and education as well as procurement.

As the Milken report stated, "America's economic future is so inextricably linked with minority and immigrant groups that investment in these communities is essential." Affirmative action, first embraced by former Vice President Nixon and by President John F. Kennedy, continues to be an important tool to remedy the effects of past discrimination, to promote equal employment opportunity, and to prevent discrimination in the future. Cases settled by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Education, the Justice Department, and other federal agencies during the Clinton Administration amply document the continuing problem of discrimination in employment and education, as well as in housing, health care, finance, and other aspects of life in the United States. The Bush Administration must examine the facts and embrace policies and programs that will ensure a truly integrated and diverse business community, workforce, and student body. America's future depends upon it.

Endnotes

[1] 515 U.S.C. § 200 (1995).

[2] 790 Federal Supplement (1992).

[3] 448 U.S.C. § 448 (1980).

[4] 497 U.S.C. § 547.

[5] 16 Federal Reporter 3d 1537 (1994).

[6] 515 U.S.C. § 227.

[7] *Id.* § 243.

[8] *Adarand Constructors v. Pena*, 965 Federal Supplement 1556 (D. Colo. 1997).

[9] *Adarand Constructors v. Romer*, Civil No. 97-K-1351 (June 26, 1997).

[10] *Adarand Constructors v. Slater*, 169 Federal Reporter 3d 1292 (10th Circuit 1999).

[11] *Adarand Constructors v. Slater*, 528 U.S.C. § 216 (2000) (*per curiam*).

[12] *Adarand Constructors v. Slater*, 228 Federal Reporter 3d 1147 (2000).

[13] 228 Federal Reporter 3d ____.

[14] U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization website, <*http://osdbuweb.dot.gov/business/dbe/Background.html*>, at 12 ("Supplementary Information").

[15] *Id.*

[16] *Id.* at 13.

[17] *Id.*

[18] Urban Institute, *Do Minority Businesses Get a Fair Share of Government Contracts?* (1997). The Urban Institute report was discussed at length in Citizens' Commission on Civil Rights, *The Continuing Struggle: Civil Rights and the Clinton Administration*, at 111-113 (1997).

[19] *Id.*

[20] Supplementary Information at 12.

[21] *Id.*

[22] "Getting Diversity Back on the Road," RockyMountainNews.com, Apr. 19, 2001, at <*http://www.msnbc.com/local/rmn/drmn324174.asp*>.

[23] Supplementary Information at 9.

[24] *Id.* at 10.

[25] *Id.*

[26] *Id.* at 4.

[27] *Id.* at 7.

[28] *Id.* at 8.

[29] U.S. Department of Transportation, Office of the Secretary, Participation by Disadvan-

taged Business Enterprises in Department of Transportation Programs, Final Rule, 64 Federal Register 5,095, 5,132-33 (Feb. 2, 1999).

[30] General Accounting Office, *Disadvantaged Business Enterprises: Critical Information Is Needed to Understand Program Impact*, GAO-01-586, at 5 (June 2001).

[31] 64 Federal Register 5,130.

[32] Milken Institute and U.S. Department of Commerce, Minority Business Development Agency, *The Minority Business Challenge: Democratizing Capital for Emerging Domestic Markets*, at iii (Sep. 25, 2000).

[33] *Id.*

[34] *Id.* at iv.

[35] *Id.*

[36] *Id.* at v.

[37] *Id.*

[38] *Id.* at vii.

[39] U.S. Department of Justice, Federal Procurement, Proposed Reforms to Affirmative Action, Notice, 61 Federal Register 26,041, 26,053.

[40] *Id.* at 26,052, note 20.

[41] *Adarand Constructors v. Mineta*, Brief for the Respondents (Aug. 11, 2001).

Chapter 12

Equal Employment Opportunity: EEOC and OFCCP

by Nancy Kreiter

I. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) enforces Title VII[1] of the Civil Rights Act of 1964 (as amended), which prohibits employment discrimination based on race, color, religion, sex, or national origin. It also enforces the Equal Pay Act of 1963,[2] which bars sex-based discrimination in compensation; the Age Discrimination in Employment Act (ADEA) of 1967, which protects workers over 40; section 501 of the Rehabilitation Act of 1973, which prohibits discrimination against individuals with disabilities in the federal sector; and the Americans with Disabilities Act (ADA) of 1990, which protects qualified individuals with disabilities from employment discrimination in the private sector and in state and local governments. In addition, under Executive Order No. 12067, the EEOC is charged with providing leadership and coordination among the federal agencies involved in equal employment opportunity issues.

At the dawn of the 21st century, the work of the EEOC continues unabated and the challenges of eradicating discrimination in the workplace remain despite the gains that have been made since the enactment of the Civil Rights Act of 1964. The EEOC, as the largest equal employment enforcement agency, engaged in a number of landmark cases during the Clinton Administration, including the *Mitsubishi* and *Texaco* cases. In the last years of the Clinton Administration, EEOC also made great strides in the effort to improve its efficiency and effectiveness. This is particularly significant given the fluctuations in EEOC's operating budget and the continual influx of new discrimination charges.

Compared with similar statistics during the Reagan and Bush years, the EEOC reduced its backlog of private sector charges significantly, received an unprecedented amount of financial settlements for victims of discrimination, reduced its charge processing time, and issued numerous policy guidelines interpreting the laws within its jurisdiction. It also launched its Comprehensive Enforcement and National Mediation Programs, thereby increasing the number of charge resolutions.

A. Policy Developments

The EEOC, under the chairmanship of Gilbert F. Casellas and, since 1998, Ida L. Castro, took a number of policy positions that will improve EEO law enforcement in the private and federal sectors. In recent years, the agency issued enforcement guidance on many significant issues, including the application of the ADA to contingent workers placed by temporary agencies and other staffing firms; policy guidance on "reasonable accommodation," "undue hardship," disability-related inquiries, and medical examinations under the ADA; guidelines on employer liability for sexual harassment by supervisors in response to the Supreme Court decisions on the subject; new federal sector 1614 regulations to streamline the discrimination complaint process for federal employees; remedies for undocumented workers; guidance on compensation discrimination; policy on mandatory binding arbitration of employment discrimination disputes as a condition of employment; and a Commission decision finding that the exclusion of prescription contraceptives in health insurance plans violated Title VII of the Civil Rights Act.

In addition, EEOC began to implement its National Mediation Program, which became fully operational in April of 1999. Mediation, a form of alternate dispute resolution, enables charging parties and employers to resolve their conflicts without lengthy litigation or agency investigations. At the urging of the civil rights community, mediation is a strictly voluntary process.

The EEOC's National Mediation Program is part of its Comprehensive Enforcement Program (CEP), initiated in 1998 to strategically coordinate and integrate agency resources, including the increased collaboration of legal and investigation staff in all agency functions from outreach to resolution. Through the CEP, the agency focused on such important issues as sex-based wage discrimination and equal pay violations; workplace harassment based on gender, race, and national origin; "glass ceiling" cases involving women and minorities; language and accent discrimination and English-only rules; and egregious discrimination cases.

B. Enforcement Performance

1. Charge Processing

In the 1990s, the Commission reversed the "full investigation" enforcement philosophy of the Reagan era by attempting to achieve a balance between individual and systemic discrimination cases. This led to the adoption of the Priority Charge Handling system, which prioritized incoming charges into three categories based upon the likelihood that discrimination may have occurred. This system has arguably helped to reduce the pending inventory or "backlog" of charges. In the last full year of the Clinton Administration (FY2000), the EEOC's pending inventory declined to 34,297, 69% lower than EEOC's all-time high of 111,345 in FY1995, third quarter. The average charge processing time for resolving private sector charges also dropped to 216 days, down from 265 days in 1999 and 379 days in FY1996. These accomplishments occurred while the agency continued to receive an average of 78,000 charges per year.

Monetary benefits obtained in 1999 and 2000 for victims of discrimination also reached a high of $210.5 million and $245.7 million, respectively. These amounts are double the benefits obtained in 1992 and 1993 ($117.7 million and $126.8 million). In addition, successful resolutions included charges settled through voluntary mediation. In 1999, 4,833 and in 2000, 7,438 charges were successfully handled using this new process. Finally, the percentage of cases found to have "reasonable cause" to believe that discrimination occurred (8.8%) is at its highest level in the history of the program after years of stagnating between 2% and 4%.

While these achievements are commendable, we must express concern that the "no cause" rate (the rate at which the EEOC finds that there is no cause to believe that an adverse employment decision was discriminatory), although slightly lower in 2000 than in 1999 (58.3% and 59.5%), is virtually unchanged since 1992, when the "no cause" rate was 61%. This "no cause" rate also compares unfavorably with the 28.5% rate in 1980. Moreover, the settlement rate of 12.5%, although climbing in past years, remains unacceptably low; nearly one-third of all charges were settled in FY1980.

2. Litigation

In the last years of the Clinton Administration, the EEOC filed and/or settled several major systemic discrimination cases and must be commended for its accomplishments. These multi-million dollar settlements of class action lawsuits encompassed a wide variety of fields affecting women in nontraditional jobs, workers of color, older workers, vulnerable recent-immigrant communities, and persons with disabilities. The agency also obtained $96.9 million in monetary benefits in 1999, but these dropped to $46.9 million in 2000, 42% of the amount obtained in 1997. In that year, a high point for the agency, the EEOC obtained $112.3 million in benefits resulting from its litigation efforts.

In 1999, the EEOC filed 439 lawsuits, but filed only 291 in 2000. However, class cases accounted for 36% of the lawsuits filed in 2000, an increase from 25% in 1999.

While the EEOC's litigation statistics do not separate direct suits from interventions, the number of known interventions, including the *Texaco* and *Coca-Cola* cases, represents some of the agency's more notable actions. The use of the intervention authority is commendable. However, if it is used to excess, the agency could be vulnerable to criticism that it is merely "ambulance chasing," or engaging in well-publicized litigation that the private bar and plaintiffs, who have received "right-to-sue" notices from the EEOC, have initiated without the agency's assistance.

C. Recommendations for the EEOC

1. The Bush (II) Administration Should Fully Fund the EEOC

This agency, whose workload increased exponentially after it received responsibility for enforcing the Americans with Disabilities Act, the Older Workers' Benefits Protection Act, and the Civil Rights Act of 1991, must have the resources it needs to do its work. In recent years, the Commission has been able to obtain important budget increases, including the 15% funding increase of $37 million in 1999 and an 8% increase in 2001. However, the most recent budget request by the Bush Administration (for FY2002) would result effectively in a budget *decrease* for the Commission because it would not cover cost-of-living/inflation adjustments. If the Bush Administration, which has unveiled its New Freedom Initiative to assist persons with disabilities, is sincerely interested in protecting the most vulnerable populations who depend upon the government to protect their employment rights, it will demonstrate its commitment by funding the EEOC at a level that will enable it to be most effective.

2. The EEOC's New Leadership Should Support the Reforms Initiated to Efficiently Prioritize Charges and to Mediate Cases

During the Clinton Administration, this agency made remarkable progress in managing its ponderous workload. The Bush (II) Administration should not return to the policies of the 1980s, which effectively shut down the agency by forcing equal attention to be given to every charge filed, discouraging class actions, and virtually denying redress to millions of discrimination victims.

3. The EEOC General Counsel Should Continue to Maximize Its Effectiveness by Strategically Targeting Its Litigation Efforts While Filing More Lawsuits

While there are many meritorious cases involving individuals, systemic or pattern and practice cases are simply more efficacious and address barriers to employment equity that affect larger numbers of workers. Once again, we must guard against returning to the 1980s, when class action cases were discouraged as administration policy. The General Counsel should use its authority to intervene in private lawsuits advisedly, however. Where such suits are proceeding successfully, the agency's resources may be better deployed elsewhere. While the new charge processing system will reduce the backlog, EEOC should make every effort to ensure that cases that appear to be meritorious are fully investigated.

4. The EEOC Should Continue Efforts to Investigate Wage Discrimination and Equal Pay Act Violations, "the Glass Ceiling," Racial/Sexual Harassment, and National Origin Discrimination as High-Priority Matters

These, among others, including age discrimination and the virtual exclusion of persons with disabilities from the workplace, are some of the most critical civil rights issues of the 21st century. Much progress was made during the Clinton Administration to address these problems, but much more is needed. In addition, more outreach needs to be done to ensure that members of the affected communities view the EEOC as an effective resource. As it was during the Clinton Administration, the federal government in general, and the EEOC in particular, must continue to be accessible if they are to truly serve the role of protector against the many forms of employment discrimination prohibited by law.

II. The Office of Federal Contract Compliance Programs

The Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor's Employment Stan-dards Administration enforces Executive Order No. 11246, which prohibits discrimi-nation by federal contractors on the basis of race, gender, national origin, color, and religion, and requires contractors to take affirmative action to promote equal employment opportunity. The program also enforces section 503 of the Rehabilitation Act of 1973, as amended, which requires nondiscrimination and affirmative action for qualified individuals with disabilities; and the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended, which requires nondiscrimination and affirmative action for special and disabled veterans of any war, campaign, or expedition in which a campaign badge has been authorized. The laws enforced by the OFCCP cover approximately one-quarter of the U.S. civilian workforce, employed by 200,000 federal contractor establishments.

A. Policy Developments

During the years 1994–2001, the OFCCP pursued three major policy initiatives: breaking the glass ceiling, narrowing the pay gap, and removing the vestiges of systemic job discrimination. The bold policy moves made by OFCCP to promote equal employment opportunity were supported by a "Three-Pronged Fair Enforcement Strategy," designed to fundamentally change, through regulatory reform, the way in which

OFCCP conducted its business. The OFCCP also significantly broadened the scope and impact of its Glass Ceiling Initiative during these years. The goal of the initiative was to examine and eliminate the subtle and attitudinal barriers that prevent women and minorities from obtaining opportunities in senior executive positions in the corporate workplace. OFCCP's glass ceiling or "corporate management reviews" (CMRs) evolved from a process of self-education and technical assistance, to a more investigatory process in which issues of discrimination and the removal of systemic barriers to promotional opportunities were emphasized. The number of CMRs conducted by OFCCP increased from one CMR in 1990 to approximately 42 in FY2000. In most instances, contractors' recruitment, promotion and/or compensation systems were improved in order to foster greater opportunity for protected groups. Since 1993, OFCCP has conducted more than 281 CMRs.

The OFCCP's equal pay efforts grew out of an attempt to develop a systemic approach to analyzing the impact of compensation policies and practices at the "glass ceiling" level. OFCCP settled several significant "equal pay" cases involving the Boeing, Texaco, CoreStates, Computer Sciences, Duke Energy, and Waste Management corporations. The Texaco and Boeing cases are also significant because they marked the beginning of OFCCP's evolution from an establishment-level investigation model to one that embraces the entire corporation, i.e., the "global settlement."

In August 1997, and in November 2000, the Department of Labor delivered on its promises and promulgated changes to the OFCCP regulations at 41 C.F.R. sections 60-1 and 60-2 respectively. This was the first successful attempt to revise the affirmative action regulations since 1978. These regulations codified the tiered compliance review process, reduced the size and required ingredients of the affirmative action program, and codified the Equal Opportunity Survey — the third prong of the Fair Enforcement Strategy. The Equal Opportunity Survey collects data regarding a contractor's personnel activity (hires, promotions, and terminations) and compensation by race and gender. This is the most comprehensive equal employment opportunity data collection instrument since the Standard Form 100 ("EEO-1") was instituted in the 1960s. The survey received strong support from organized labor and the civil rights community.

B. Enforcement

Since 1993, OFCCP obtained more than $275 million for more than 53,000 women, minorities, persons with disabilities, and veterans. During those years, OFCCP conducted an average of 4,000 compliance evaluations, and since 1998, 2000 compliance checks per year. As a result of "linkages" that OFCCP established with contractors and placement/training organizations, an average of 3,000 persons per year obtained employment at approximately $75 million per year in annual salaries. The program also maintained an active inventory of approximately 30 large federal construction "megaprojects" per year in order to promote opportunities for women and minorities in the construction trades. These achievements occurred in a time when affirmative action sustained intense scrutiny.

While OFCCP maintained an excellent compliance program, combining quantity with quality of compliance activity, the number of administrative complaints filed by the Department of Labor's Office of the Solicitor (SOL) showed a marked decline in these years. When OFCCP is unable to reach a settlement with federal contractors, it may refer the cases to SOL, which is authorized to file administrative complaints on OFCCP's behalf before the Department's administrative law judges. Administrative complaints constitute the beginning of a lengthy enforcement process that can lead to the debarment of a contractor from receiving federal contracts. While SOL filed a total of 34 complaints in 1991 and 30 in 1994, its filing record declined precipitously in subsequent years. At its lowest point, in FY2000, SOL filed only 13 administrative complaints, nine of which included complaints filed against a single contractor. To its credit, SOL recently appointed civil rights counsel in each region – a welcome addition that will promote expertise in an area of law that requires constant practice and learning.

During the Clinton Administration, OFCCP/SOL obtained 11 debarments, the highest number since the Carter Administration. However, it should be noted that there was no debarment activity between 1997 and 2000. Debarments are a severe remedy and should be pursued only when other options are unavailable. However, one cannot overstate the importance of enforcement, including debarments when necessary, in order to reflect the seriousness of the department's law enforcement effort and the importance of the law itself to its beneficiaries and to the workforce at large.

C. Recommendations for the OFCCP

1. As the OFCCP Enters into a New Era of Enforcement with the Advent of the Bush Administration, It Must Continue to Vigorously Defend Affirmative Action and Pursue Systemic Discrimination

OFCCP should emphasize the inverse relationship between affirmative action and discrimination, and should continue to investigate discriminatory, systemwide barriers to equal employment opportunity from the entry level to the executive suite. The new administration must clarify the myths about affirmative action and educate its constituents who would argue that the OFCCP program enforces quotas or preferences. The revised regulations made patently clear that quotas are illegal. OFCCP must also continue to publicize its settlements in order to gain the multiplier effect of such publicity with other contractors.

2. The Equal Opportunity Survey Should be Fully Integrated into OFCCP's Compliance Activities

The Survey was fully tested and any burdens imposed upon the contractor community are balanced by the reductions in the size and content of the affirmative action program. Unequal pay is one of the most significant civil rights issues of the 21st century and the Department of Labor must continue the effort to remove the vestiges of compensation discrimination from the workplace. The annual collection of survey data — which forces contractors to analyze their compensation policies and practices and eliminate any disparities — is intended to aid in this effort and should be fully funded and left to achieve this essential mission.

3. The Office of the Solicitor of Labor Should Fully Embrace Its Responsibility to Enforce the Civil Rights Laws Entrusted to It

The solicitor's office should implement an enforcement plan that provides training, filing of administrative complaints in each region and in the national office, reducing aged cases, and expeditiously returning unlitigable cases to the agency for alternate dispute resolution. Justice delayed is justice denied. Productivity and accountability standards should be developed and enforced, and increased cooperation between the field offices and the Associate Solicitor for Civil Rights is essential. Failing these changes, the Secretary of Labor should permit the OFCCP to hire outside counsel to assist it in enforcing the law where conciliation efforts fail. The Secretary should also consider removing the exemption that the Office of the Solicitor currently enjoys from the accountability and performance standards required by the Government Performance and Results Act.

Endnotes

[1] 42 U.S.C. § 2000e.
[2] 29 U.S.C. § 206d.

Chapter 13

Federal Action to Confront Hate Violence in the Bush Administration: A Firm Foundation on Which to Build or a Struggle to Maintain the Status Quo?

by Michael Lieberman[1]

I. Defining the Issue: The Impact of Hate Violence

All Americans have a stake in effective response to violent bigotry. These crimes demand priority attention because of their special impact. Bias crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. Failure to address this unique type of crime could cause an isolated incident to explode into widespread community tension. The damage done by hate crimes, therefore, cannot be measured solely in terms of physical injury or dollars and cents. By making members of minority communities fearful, angry, and suspicious of other groups — and of the power structure that is supposed to protect them — these incidents can damage the fabric of our society and fragment communities.

The urgent national need for both a tough law enforcement response as well as education and programming to confront violent bigotry has only increased over the past few months. In the aftermath of the September 11 terrorism, the nation has witnessed a disturbing increase in attacks against American citizens and others who appear to be of Muslim, Middle Eastern, and South Asian descent. Perhaps acting out of anger at the terrorists involved in the September 11 attacks, the perpetrators of these crimes are irrationally lashing out at innocent people because of their personal characteristics — their race, religion, or ethnicity. Law enforcement officials are now investigating hundreds of incidents reported from coast to coast — at places of worship, neighborhood centers, grocery stores, gas stations, restaurants, and homes — including vandalism, intimidation, assaults, and several murders.

In response to this disturbing series of attacks, all of the key administration officials — including President George W. Bush, First Lady Laura Bush, Secretary of Education Rod Paige, Attorney General John Ashcroft, FBI Director Robert Mueller, and Assistant Attorney General for Civil Rights Ralph Boyd, Jr. — have spoken out against hate crimes and reached out to affected communities. The Justice Department has launched more than 300 federal civil rights investigations — and is now on pace to bring a record number of federal hate crime indictments emanating from these incidents. On September 26, at a meeting with Sikh leaders at the White House, President Bush pledged that "our government will do everything we can not only to bring those people to justice, but also to treat every human life as dear, and to respect the values that made our country so different and so unique. We're all Americans, bound together by common ideals and common values."

Yet, many of the President's core constituents — including some conservative and right-wing organizations, adamantly oppose all hate crime initiatives. It is too early to tell what new hate crime prevention and response programs the Bush Administration will support — and what level of commitment the administration will have to existing federal hate crime prevention and response initiatives, many of which were initiated in the second term of the Clinton Administration.

II. Early Response to Clinton Administration Initiatives

The second term of the Clinton Administration was marked by an unprecedented White House commitment to improve race relations and address hate crimes in an inclusive and comprehensive manner. During that time, President Clinton established a Race Initiative, hosted a national conference on hate crimes, and, on many occasions, spoke out in support of improved intergroup relations and against prejudice, bigotry, and bias-motivated violence. Other Cabinet officials — most notably Attorney General Janet Reno — also repeatedly spoke out against hate violence and helped spark the development of a number of important new federal initiatives.[2]

An early indication of the level of engagement of the Bush Administration in effective federal response to hate violence will be found in the degree to which the most notable Clinton Administration initiatives are carried forward.

A. Regional U.S. Attorney-Led Police-Community Hate Crime Working Groups (HCWGs)

An effort to improve local community coordination among affected parties in responding to hate violence, HCWGs were established at the direction of Attorney General Janet Reno in many of the 90-plus U.S. attorney's offices. Designed to enhance communication on hate crime investigations and prosecutions, improve hate crime data collection efforts, and promote expanded law enforcement training, the HCWGs have been composed of FBI investigators, state and local law enforcement officials, prosecutors, community-based organizations, and civil rights groups.[3]

Following the September 11 attacks, the Bush Administration established U.S. Attorney counterterrorism task forces. While the principal focus of these groups will clearly be directed at investigating and preventing terrorism, it is too early to tell whether U.S. Attorneys will also continue to play a leadership role in helping to ensure a coordinated local response to hate violence.

B. Law Enforcement Hate Crime Training Programs

The Clinton Justice Department developed several excellent hate crime training curricula — designed for different command levels of Federal, state, and local law enforcement officials — and conducted a number of regional training sessions across the country, training over 5600 officers.

The Justice Department under John Ashcroft has not promoted continuing hate crime training using these curricula, although a wide array of training materials and hate crime response resources are available at the Justice Department Web site, <www.usdoj.gov>.

C. Improved Data on Hate Crimes

In an effort to better gauge the magnitude of the hate crime problem in America, the Bureau of Justice Statistics (BJS) in the Clinton Justice Department added questions about hate violence to its well-established National Crime Victimization Survey (NCVS), an annual assessment of crime in America that complements the FBI's national crime collection effort under the Uniform Crime Reporting System.

Although efforts to perfect survey instruments were ongoing throughout the last months of the Clinton Administration, no NCVS report using new hate crime data has yet been published.

However, in September 2001, BJS published a Special Report derived from close analysis of a small subset of the hate crimes reported to the FBI from 1997 to 1999. This report, Hate Crimes Reported in NIBRS, 1997–99,[4] *provided previously unavailable detail about both hate crime victims and offenders, including useful information about youthful hate crime offenders.*

In 1998, Congress amended the Higher Education Act to require the Department of Education to collect information on a variety of crime categories — including acts directed at individuals because of their race, religion, sexual orientation, national origin, and disability — from the nation's 6,000 postsecondary institutions and to make the information widely available.

Secretary of Education Rod Paige released the 2000 data in November 2001. These reports, available online at <http://ope.ed.gov/security>, *include a significant increase in the number of reported hate crimes on campus.*[5]

D. Partners Against Hate: Confronting Youth-Initiative Bias Crime

In 1992, Congress approved several new hate crime and anti-bias initiatives as part of the Juvenile Justice and Delinquency Prevention Act reauthorization.[6] Since then, the Justice Department's Office of Juvenile Justice Delinquency Prevention (OJJDP) has achieved distinction for the development of fine educational resources and training curricula addressing hate violence. In September 2000, OJJDP awarded a three-year $3 million grant to the Partners Against Hate project created by the Anti-Defamation League, the Leadership Conference Education Fund, and the Center for the Prevention of Hate Violence.

Partners Against Hate has designed and begun to implement an ambitious three-year program of outreach, public education, and training to help address the cycle of bias, hatred, distrust, and violence by: (1) increasing public awareness — especially among youth and juvenile justice professionals — about promising practices to reduce and prevent youth-initiated hate violence; (2) providing effective hate crime prevention and intervention strategies and training and technical assistance for law enforcement agencies, educators, religious and community leaders, parents, and youth; and (3) helping individuals working with youth embrace the potential of advanced communications technologies — particularly the Internet — to break down barriers, address biases, and provide communities with the services and support they need.

The Partners website, *<www.partners-againsthate.org>*, serves as a comprehensive clearinghouse of hate crime-related information, including resources developed through the grant, as well as other promising programs from across the country. In addition, the website includes access to the finest database of hate crime laws that form the basis of criminal enforcement in the states, and counteraction tools.

E. Educating Youth About Hate Crimes

In the Clinton Administration, the Department of Justice and the Department of Education jointly produced and distributed a manual for educators on the causes of hate crimes, responses to prejudice and bigotry, and useful resources on the subject.[7] The Justice Department also developed an interactive hate crime website for children.

The still-developing Justice Department website for children, <www.usdoj.gov/kidspage/>, *has eliminated the interactive hate crime pages, but retains a link to the very useful Justice/Education educators' manual.*

The Department of Education's Office for Civil Rights, in association with the National Association of Attorneys General, provided excellent counsel and programming for schools in a publication, "Protecting Students from Harassment and Hate Crimes: A Guide for Schools."

This Guide is available at the Department of Education's website at <www.ed.gov/pubs/Harassment/>.

In a very welcome indication of continuity, the Justice Department's Bureau of Justice Assistance published Hate Crimes on Campus: The Problem and Efforts to Confront It[8] *in October 2001. This monograph, which continues the BJA's "Hate Crime Series," was prepared by staff at the Center for the Prevention of Hate Violence. The report examines the prevalence of hate violence on campus and the impact of these acts, identifies common obstacles colleges face in effective response to campus hate crimes, and describes several promising strategies to respond and prevent campus hate crime.*

F. Legislation to Expand Federal Hate Crime Investigative and Prosecutorial Authority

Clinton Administration officials, working with Members of Congress and representatives of civil rights groups, developed legislation which would eliminate the current overly-restrictive obstacles to federal involvement in hate crime cases and expand authority for federal investigations and prosecutions in cases in which the bias violence occurs because of the victim's sexual orientation, gender, or disability. Clinton Administration officials actively supported this legislation in the 106th Congress.

President Bush did not support this legislation during President debates with former Vice President Al Gore. Then-Senator Ashcroft opposed this legislation when the Senate approved the measure as an amendment to a defense authorization bill 57 to 42 in June 2000. Both President Bush and Attorney General Ashcroft have expressed support for legislation, sponsored by Senator Orrin Hatch (R-Ut.), which calls for a national study of hate crimes and creates a grant program for state and local authorities to combat hate-motivated crimes.

III. The 107th Congress

Before September 11, the first session of the 107th Congress had been characterized by partisan wrangling over budget and tax issues. After the terrorist incidents, members of Congress have tried to downplay party politics in an effort to focus on needed counterterrorism and aviation security measures. At the end of the session, Congress succeeded in reauthorizing the Elementary and Secondary Education Act (ESEA), the most important federal funding measure for public schools. Despite significant opposition by some national conservative groups, Congress retained the important anti-bias programming authority in ESEA. This measure, along with the pending Local Law Enforcement Enhancement Act (LLEEA), are the top legislative priorities for the coalition of civil rights, religious, law enforcement, and education groups that advocate on behalf of strong federal action to confront hate violence.

A. Reauthorization of the Elementary and Secondary Education Act

In 1994, with broad bipartisan support, Congress approved several important new initiatives as part of the ESEA to provide training and technical assistance for communities to address violence associated with prejudice and intolerance. Under these provisions in ESEA, a number of innovative and successful prejudice reduction programs have been developed and piloted in local communities across the country. Title IV of the Act, Safe and Drug Free Schools and Communities, also included a specific hate crimes prevention initiative — promoting curriculum development and training and development for teachers and administrators on the cause, effects, and resolutions of hate crimes or hate based conflicts. The enactment of these federal initiatives represented an essential advance in efforts to institutionalize anti-bias initiatives as a component of violence prevention programming.

Yet, these important provisions have also attracted persistent, vehement opposition from some conservative and right-wing organizations.[9] In part because of this vocal (if wrongheaded and erroneous) opposition, the leadership of the House Committee on Education and the Workforce removed every existing reference to bias, prejudice, and hate crime as they crafted their version of the ESEA rewrite early in the session. The House approved this version in May — without the hate crime provisions. The Senate passed its version of the bill, which retained each of the hate crime provisions, in June. Efforts to reconcile the two versions on a wide range of issues continued until early December. On several occasions over that period of time, a broad coalition of over 100 civil rights, religious, law enforcement, civic, and education groups sent letters of strong support for the hate crime provisions. In the end, overcoming considerable opposition, the version signed into law by President Bush in January 2002 retained existing hate crime prevention authority.[10]

B. The Local Law Enforcement Enhancement Act: Closing Gaps in Federal Law

First proposed in the aftermath of the 1997 White House Conference on Hate Crimes, the LLEEA would permit federal investigations and prosecutions of certain hate crimes. This new authority would complement section 245 of Title 18 U.S.C. — one of the primary statutes now used to combat racial and religious bias-motivated violence. That statute prohibits intentional interference, by force or threat of force, with enjoyment of a federal right or benefit (such as voting, going to school, or working) on the basis of the victim's race, color, religion, or national origin. Under the current law, enacted in 1968, the government must prove that the crime occurred because of a person's membership in a protected group — *and because* (not while) he/she was engaging in a federally protected activity. Justice Department officials have identified a number of significant racial violence cases in which federal prosecutions have been stymied by these unwieldy dual jurisdictional requirements.

The LLEEA would remove these overly restrictive obstacles to federal involvement by permitting prosecutions without having to prove that the victim was attacked because he/she was engaged in a federally protected activity. Second, it would provide expanded authority for federal officials to investigate and prosecute cases in which the bias violence occurs because of the victim's actual or perceived sexual orientation,[11] gender,[12] or disability.[13]

The vast majority of bias crimes are effectively addressed at the state and local level. However, in states without hate crime statutes, and in others with limited coverage, local prosecutors are simply not able to pursue bias crime convictions.[14] In a limited number of these cases, and others in which the local prosecutor is unable or unwilling to investigate and prosecute, federal assistance or involvement is warranted.[15]

As drafted, the LLEEA contains a number of significant limitations on prosecutorial discretion. First, the bill's requirement of actual injury, or, in the case of crimes involving "the use of fire, a firearm, or an explosive or incendiary device," an attempt to cause bodily injury, limits the federal government's jurisdiction to the most serious crimes of violence against individuals — not property crimes.

Second, for the proposed new categories — gender, sexual orientation, and disability — federal prosecutors would have to prove an interstate commerce connection with the crime — similar to the constitutional basis relied upon for the Church Arson Prevention Act, which was passed unanimously by Congress in 1996.

Third, the LLEEA includes a certification requirement comparable to the limitations under 18 U.S.C. 245. Justice Department officials have historically been extremely selective in choosing which cases to prosecute under the federal criminal civil rights statutes. For example, in 2000, a year in which the FBI's Hate Crimes Statistics Act (HCSA) report documented 8,063 hate crimes reported by 11,690 police agencies, the Justice Department brought only 25 racial violence cases under all federal criminal civil rights statutes combined. In fact, since its enactment in 1968, there have never been more than *ten* indictments in any year under 18 U.S.C. § 245. Yet, while the number of federal prosecutions for racial violence is small, these efforts provide an essential supplement to state and local criminal prosecutions. The importance of these few cases cannot be overstated. For example, a number of the racial violence cases involve prosecutions of members of the Ku Klux Klan and other organized hate groups. These cases — 7 in 2000, involving 7 defendants, and 8 more cases in the last two years, involving 16 defendants — help to demonstrate the federal government's resolve to combat organized bigotry.[16]

Supporters of the LLEEA know well that new federal criminal civil rights jurisdiction to address crimes directed at individuals because of their gender, sexual orientation, or disability will not result in the elimination of these crimes. But the possibility of federal prosecutions in select cases, the impact of FBI investigations in others, and expanded partnership arrangements with state and local investigators in still other cases, should prompt more effective state and local prosecutions of these crimes. The LLEEA also includes grants for state and local hate crime investigations and prosecutions. Especially at this time of enhanced counterterrorism coordination between law enforcement authorities, facilitating Federal, state, and local cooperative working arrangements to combat hate violence and other forms of domestic terrorism has great merit.

In the 106th Congress, bipartisan majorities in both the Senate and the House voted to approve the measure. On June 20, 2000, the Senate voted 57 to 42 to include the language of the Local Law Enforcement Enhancement Act as an amendment to the Department of Defense Authorization bill. On September 13, the House instructed its par-

Federal Criminal Civil Rights Statutes[21]

State and local law enforcement authorities play the primary role in the prosecution of bias-motivated violence. Current federal law contains significant gaps and limitations — reaching only racially-motivated violence which is intended to interfere with the victim's federal rights or participation in a federally-protected activity. The federal government does play a critical role in supplementing state and local prosecutions in appropriate circumstances.

42 U.S.C. section 3631, the criminal portion of the Fair Housing Act of 1968, prohibits housing-related violence on the basis of race, color, religion, sex, handicap, familial status, or national origin. The violence usually prosecuted under this section includes cross-burnings, firebombings, arsons, gunshots, rock throwing, and vandalism. The statute reaches all persons involved in any housing-related activity — sellers, buyers, landlords, tenants, and real estate agents.

18 U.S.C. section 245 is the primary criminal civil rights statute for racial violence cases that do not involve housing. As enacted in 1968, section 245 prohibits the use of force or threats of force against individuals because of their race, color, religion, or national origin, *and because* those individuals are engaged in certain specified activities. Section 245 protects against race-based interference in the right to enroll in public school or college; the right to participate in and enjoy any benefit, service, or program administered by a state; employment by any private employer or state or local agency; travel in or use of a facility of interstate commerce; and enjoyment of goods or services of any place of public accommodation.

18 U.S.C. section 247 criminalizes attacks on religious property and obstructions of persons who are enjoying the free exercise of their religious beliefs. This statute, originally enacted in 1988 and amended by the Church Arson Prevention Act of 1996, covers racially-motivated church burnings and bombings, as well as acts of desecration motivated by religious animus when the defendant has traveled in interstate commerce or has used a facility or instrumentality of interstate commerce.

18 U.S.C. section 241 broadly prohibits a conspiracy to injure or threaten "any person" in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.

ticipants in a House-Senate conference meeting to reconcile differences in that bill to retain that hate crimes language by a margin of 232 to 192. Unfortunately, at the urging of Republican leadership in the House and Senate, the LLEEA was stripped from the final version of this legislation. In this Congress, the measure has attracted over 200 cosponsors in the House and 51 in the Senate. The Senate Judiciary Committee approved the bill in July 2001, and the measure is expected to be taken up in the Senate early in the second session.

IV. The Hate Crime Statistics Act (HCSA)[18]

Though a number of private groups[19] and state law enforcement agencies track incidents of hate violence, the HCSA now provides the best national picture of the magnitude of the hate violence problem in America — though still clearly incomplete. Enacted in 1990, the HCSA requires the Justice Department to acquire data on crimes that "manifest prejudice based on race, religion, sexual orientation, or ethnicity" from law enforcement agencies across the country and to publish an annual summary of the findings. In the Violent Crime Control and Law Enforcement Act of 1994,[20] Congress expanded coverage of the HCSA to require FBI reporting on crimes based on "disability."

V. The FBI's 2000 HCSA Data at a Glance

As documented by the FBI in its November 2001 report, *Hate Crime Statistics, 2000*, violence directed at individuals, houses of worship, and community institutions because of prejudice based on race, religion, sexual orientation, national origin, and disability is disturbingly prevalent. While the overall number of crimes reported to the FBI in 2000 declined slightly (0.2%), reported hate crimes increased 2.3% — from 7,876 in 1999 to 8,063 in 2000. Another disappointing element of the 2000 report was the fact that the number of law enforcement agencies participating in the HCSA data collection effort decreased from 12,122 in 1999 to 11,690 in 2000. Here are highlights from the 2000 report:

- About 54% of the reported hate crimes were race-based, with 18% committed against individuals on the basis of their religion, 11% on the basis of ethnicity, and over 16% against gay men and lesbians.
- Overall, approximately 36% of the reported crimes were anti-black, 11% of the crimes were anti-white, 3.5% of the crimes were anti-Asian, and 6.9% anti-Hispanic.
- The 1,109 crimes against Jews and Jewish institutions comprised almost 14% of the total — and 75% of the reported hate crimes based on religion.
- Only 73% of the 16,000 law enforcement agencies that regularly report crime data to the FBI are reporting hate crime data to the Bureau. Moreover, as in years past, the vast majority of these "participating" agencies affirmatively reported that *no hate crimes were committed in their jurisdictions*. Of the 11,690 departments participating in the 2000 HCSA data collection effort, only 1,892 (16%) reported even one hate crime.

Clearly these hate crime numbers do not speak for themselves. Behind each and every one of these statistics is an individual or a community targeted for violence for no other reason than race, religion, sexual orientation, disability, or ethnicity. Despite an incomplete reporting record over the first ten years of the Act, the HCSA has proved to be a powerful mechanism to confront violent bigotry against individuals on the basis of their race, religion, sexual orientation, or ethnicity. In addition, the Bureau's annual jurisdiction-by-jurisdiction hate crime report provides an important measure of accountability for those law enforcement agencies that report — and those that do not.[21] Importantly, the HCSA has also increased public awareness of the problem and sparked improvements in the local response of the criminal justice system to hate violence.[22] Studies have demonstrated that victims are more likely to report a hate crime if they know a special reporting system is in place.[23]

Police officials have come to appreciate the law enforcement and community benefits of tracking hate crime and responding to it in a priority fashion. Law enforcement officials can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.[24] By compiling statistics and charting the geographic distribution of these crimes, police officials may be in a position to discern patterns and anticipate an increase in racial tensions in a given jurisdiction.

However, studies by the National Organization of Black Law Enforcement Executives (NOBLE) and others have revealed that some of the most likely targets of hate violence are the least likely to report these crimes to the police.[25] In addition to cultural and language barriers, some immigrant victims, for example, fear reprisals or deportation if incidents are reported. Many new Americans come from countries in which residents would never call the police — *especially* if they were in trouble.[26] Gay and lesbian victims, facing hostility, discrimination, and, possibly, family pressures because of their sexual orientation, may also be reluctant to come forward to report these crimes.[27] These issues present a critical challenge for improving law enforcement response to hate violence. When police departments implement the HCSA in partnership with community-based groups, the effort should enhance police-community relations.[28]

VI. Addressing Youth-Initiated Hate Violence

There is growing awareness of the need to complement tough laws and more vigorous enforcement — which can deter and redress violence motivated by bigotry — with education, training, and diversion initiatives designed to reduce bias-motivated violence. The federal government has a central role to play in funding program development in this area and promoting awareness of initiatives that work.

There is a paucity of published information about juvenile hate crime offenders. The FBI's annual HCSA report, though clearly incomplete, now provides the best national picture of the magnitude of the hate violence problem in America. That report, however, does not provide specific information about either juvenile hate crime offenders or victims. In fact, a 1996 OJJDP "Report to Congress on Juvenile Hate Crime" stated: "the research team found very little information pertaining to the issue of hate crimes in general and even less on the nature and extent of juveniles' involvement."[29]

The September 2001 Bureau of Justice Statistics Special Report, *Hate Crimes Reported in NIBRS, 1997–99* closely examined about 3,000 of the almost 24,000 hate crimes reported to the FBI during that period and found that 60% of the hate crimes reported under the incident-based system were violent crimes, while only 20% of the other incident-based reports were violent crimes.

Perhaps most important, the report provided disturbing information about the too-frequent involvement of juveniles in hate crime incidents. The report documented that a disproportionately high percentage of both the victims of hate violence and the perpetrators were young people under 18 years of age:

- Thirty-three percent of all known hate crime offenders were under 18 — 31% of all violent crime offenders and 46% of the property offenders.
- Another 29% of all hate crime offenders were 18 to 24.
- Thirty percent of all victims of bias-motivated aggravated assaults and 34% of the victims of simple assault were under 18.
- Thirty-four percent of all persons arrested for hate crimes were under 18 — 28% of the violent hate crimes and 56% of the bias-motivated property crimes.
- Another 27% of those arrested for hate crimes were 18 to 24.

VII. A Hate Violence Deterrence and Response Action Agenda for the Bush Administration and the 107th Congress

A. Enforcement of Federal Hate Crime and Civil Rights Statutes

- *Congress should enact the Local Law Enforcement Enhancement Act, legislation that would remove the current overly restrictive obstacles to federal involvement in bias-motivated crimes and provide expanded authority for federal officials to investigate and prosecute cases in which the bias violence occurs because of the victim's actual or perceived sexual orientation, gender, or disability. Congress and the administration should provide the resources necessary to develop training materials to successfully implement this expanded authority.* State and local authorities investigate the vast majority of hate crime cases — and will continue to do so after the LLEEA is enacted into law. The LLEEA, however, would provide a necessary backstop to state and local enforcement by permitting federal authorities to provide assistance in these investigations — and by allowing federal prosecutions when necessary to achieve a just result.
- *Working with U.S. Attorneys and private civil rights and community-based organizations, the Justice Department should continue to help coordinate Hate Crime Working Groups (HCWGs) in every judicial district in the country.* Established in many of the 90-plus federal districts across the country under the Clinton Administration, HCWGs are well equipped to make decisions on state and local hate crime initiatives, to improve hate crime data collection efforts and enforcement of existing laws, and to set priorities for the future.
- *Justice Department officials should vigorously investigate and, where appropriate, prosecute threats of violence transmitted over the Internet. Federal prosecutors should be trained in how to investigate and prosecute hate crimes on the Internet.* In 1998, prosecutors obtained the first federal criminal civil rights conviction in a case involving an individual who had sent email messages threatening to "hunt

down and kill" Asian American students at the University of California at Irvine.[50]

- *The Justice Department and the FBI should provide expanded training on the federal hate crime sentencing enhancement provisions.* While the 1994 federal sentencing enhancement provision has been used to step up penalties for crimes in which the victim was targeted because of race, religion, or national origin, it has, apparently, never been applied in cases involving victims targeted because of their sexual orientation, disability, or gender. Though federal criminal civil rights statutes do not currently include these categories, the use of this enhancement in other bias-motivated crimes should be encouraged.

- *The FBI should take steps to enhance civil rights and hate crime-related positions within the Bureau as career-advancing posts.*

B. Improved Data on Hate Crimes

- *Congress and the administration should promote comprehensive implementation of the Hate Crime Statistics Act (HCSA) by state and local enforcement officials.* The Justice Department's Bureau of Justice Statistics has funded a necessary study on the differences in HCSA reporting rates among national law enforcement agencies. The federal government should use its full range of resources to implement policy recommendations from that study and encourage comprehensive participation in the national data collection initiative.

- *The Justice Department should make participation in the HCSA program a prerequisite for receiving money through either the Office of Community Oriented Policing Services (COPS) or its Office of Justice Programs (OJP).* Congress and the administration should require that new officers hired under the COPS initiative receive training in how to identify, report, and respond to hate violence. Congress and the administration should make the receipt of OJP technical assistance grants dependent on participation in the HCSA data collection effort.

- *Congress and the administration should provide additional incentives for HCSA implementation, including national recognition, matching grants for training, a network to promote replication of successful programs, and awards for exemplary departments.* The readiness of the criminal justice system to address hate violence has significantly improved over the ten-year history of the HCSA. As efforts to implement the HCSA continue and expand, we will learn more about the perpetrators of these especially hurtful crimes — and how to prevent them.

- *Congress and the administration should provide funds for a national assessment of juvenile hate violence, its causes, the prevalence of the problem in public schools, the characteristics of the offenders and victims, and successful intervention and diversion strategies.* The problem of bias-motivated gang activity and youth violence has not been effectively studied. Additional efforts are necessary to identify and promote effective programs, including community service and alternative sentencing options.

C. Federal Hate Crime Research and Training Initiatives

- *Congress and the administration should provide the necessary resources to widely promote and continue outreach using the*

Justice Department's excellent law enforcement training curricula.

- *The administration and Congress should take steps to ensure that the FBI receives sufficient funding to continue to respond to requests for hate crime training from law enforcement agencies across the country, as well as funding to continue its own training and education outreach efforts for both new agents and in-service training for field agents at its Quantico training academy.*

- *Congress and the administration should promote hate crime training initiatives for prosecutors and judges.* Building on successful and established hate crime training initiatives for police officers and executives, the next critical step is the development of model protocols, a model training guide, and an overall hate crime training curriculum for prosecutors.[31]

- *Congress and the administration should provide funding to study federal and state hate crime prosecutions, including the number of convictions, the perpetrators, the impact of incarceration, and the recidivism rate.*

- *Congress and the administration should provide resources to promote education and training initiatives for juvenile justice and victim assistance professionals.* Excellent resources for these two groups have been developed in recent years — including excellent new resources created by Partners Against Hate under a Justice Department grant — but additional funds are necessary to promote outreach and training for professionals who serve these constituencies.

- *Congress and the administration should fund research on racist prison gangs and develop initiatives to address inmate recruitment.* At least two of the men convicted of the murder of James Byrd, Jr., in Jasper, Texas, in 1998 were members of white supremacist prison gangs during their previous incarceration.

D. The Justice Department's Community Relations Service (CRS)

- *Congress and the administration should provide the Community Relations Service with sufficient funding to fulfill its vital and unique violence prevention mandate.*

- *Congress should act to expand the mandate of CRS to include providing mediation and conciliation services on the basis of religion and sexual orientation.*[32] Limited by its authorizing statute (Title X of the Civil Rights Act of 1964) to respond only to conflicts based on race, color, and national origin, CRS has been unable to respond to well-documented evidence that a high incidence of hate-based crimes are committed against gays and lesbians and religiously identified people.

E. Education

The American Psychological Association (APA), in a landmark 1993 report,[33] documented the role of prejudice and discrimination in fostering social conflict that can lead to violence. Educational resources are effective tools to alter attitudes and behaviors — which in turn can prevent and reduce acts of hatred and discrimination.[34]

- *The Department of Education should make information available regarding successful prejudice-reduction and hate crime prevention programs and resources.*

Resources must be allocated to institute and replicate best practices and promising programs on prejudice awareness, juvenile diversion, conflict resolution, and multicultural education.[35]

- *Congress and the administration should provide funding for the anti-prejudice initiatives included in the recently reauthorized Elementary and Secondary Education Act.* **In addition to hate crime prevention programs, the federal government should fund properly crafted citizenship and character education initiatives and programs to support teaching about the Bill of Rights.**

- *The Justice Department, the Department of Education, and other involved federal agencies should institutionalize and coordinate their response to prejudice-motivated violence — including gang violence — through programs and initiatives developed for schools and community youth violence prevention programs.*

- *In consultation with the Justice Department, the Department of Education should provide training and technical assistance to officials at colleges and universities to ensure comprehensive implementation of the campus hate crime reporting requirements included in the 1998 amendments to the Higher Education Act.*

- *The Department of Education should analyze the hate crime data it receives from colleges and universities and publish an annual report — similar to the separate annual report published by the FBI under the Hate Crime Statistics Act of 1990.*

- *Congress and the administration should support efforts to study hate on the Internet, analyzing its use for the dissemination of propaganda, evaluating the extent to which this propaganda is accessible to minors, and making appropriate recommendations for response — not regulation or censorship.*[36]

F. Responding to Racism and Hate Crimes in the Armed Forces

- *The Department of Defense and all branches of the military should increase their efforts to collect information on extremist groups, provide anti-bias and anti-gay harassment training for all recruits and military personnel, improve procedures for screening out racist recruits, and clarify and publicize existing prohibitions against active duty participation in hate group activity.*

- *Congress should hold oversight hearings on the Defense Department's implementation of initiatives on hate groups in the military enacted as part of the National Defense Authorization Act of 1997.*

- *Congress and the administration should support legislation to amend the Uniform Code of Military Justice, which governs military conduct, to provide enhanced penalties for bias-motivated violence committed by members of the Armed Forces.*

G. Leadership from Political and Civic Leaders

- *Congress and the administration should help promote civility and acceptance of differences in our society.* **As the nation witnessed a series of disturbing attacks against individuals perceived to be Middle Eastern, Arab, or Muslim, in the aftermath of the September 11 terrorist incidents, we were reminded of the need to directly confront the prejudice and intolerance that can lead to hate crimes —**

in our communities, in our houses of worship, in our schools, and, especially, in our homes.

- *Members of Congress and administration officials should seek opportunities to speak out against bigotry, intolerance, and prejudice in our society.* It is hard to overstate the importance of outspoken leadership in opposition to all forms of bigotry. Our civic leaders set the tone for national discourse and have an essential role in shaping attitudes.

- *Politicians and civic leaders should never engage in divisive appeals based on race, ethnicity, sexual orientation, or religion.*

Comparison of FBI Hate Crime Statistics, 1991-2000

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Participating Agencies	2,771	6,181	6,865	7,356	9,584	11,355	11,211	10,461	12,122	11,690
Total Hate Crime Incidents Reported	4,558	7,466	7,587	5,932	7,947	8,759	8,049	7,755	7,876	8,063
Number of States, including D.C.	32	42	47	44	46	50	49	47	49	49
Percentage of U.S. Population Agencies Represent	N/A	51	58	58	75	84	85	79	85	84.2

Offenders' Reported Motivations in Percentages of Incidents

	1991*	1992	1993	1994	1995	1996	1997	1998	1999	2000
Racial Bias	2,963/62.3	4,025/60.7	4,732/62.4	3,545/59.8	4,831/60.8	5,396/61.6	4,710/58.5	4,321/55.7	4,295/54.5	4,337/53.8
Anti-Black	1,689/35.5	2,296/34.7	2,815/37.1	2,174/36.6	2,988/37.6	3,674/41.9	3,120/38.8	2,901/37.4	2,958/37.6	2,884/35.8
Anti-White	888/18.7	134,220.30	1,471/19.4	1,010/17	1,226/15.4	1,106/12.6	993/12.3	792/10.2	781/9.9	875/10.9
Religious Bias	917/19.3	1,162/17.5	1,298/17.1	1,062/17.9	1,277/16.1	1,401/15.9	1,385/17.2	1,390/17.9	1,411/17.9	1,472/18.3
Anti-Semitic	792/16.7	1,017/15.4	1,143/15.1	915/15.4	1,058/13.3	1,109/12.7	1,087/13.5	1,081/13.9	1,109/14.1	1,109/13.8
Anti-Semitic as Percentage of Religious Bias	86.4	87.5	88.1	86.2	82.9	79.2	78.5	77.7	78.6	75.3
Ethnicity	450/9.5	669/10.1	697/9.2	638/10.8	814/10.2	940/10.7	836/10.4	754/9.7	829/10.5	911/11.3
Sexual Orientation	425/8.9	767/11.6	860/11.3	685/11.5	1,019/12.8	1,016/11.6	1,102/13.7	1,260/16.2	1,317/16.7	1,299/16.1

*1991 - due to limited data, this column represents offender's reported motivations in percentages of offenses.

Charts compiled by the Anti-Defamation League's Washington Office from information collected by the FBI

State by State Comparison, HCSA Reporting

	1991		1992		1993		1994		1995		1996		1997		1998		1999		2000	
State	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Alabama	**	**	4	4	4	5	**	**	**	**	289	0	282	0	**	**	**	**	**	**
Alaska	**	**	**	**	1	24	1	9	1	8	1	9	1	10	**	**	1	5	1	4
Arizona	1	48	90	172	89	208	82	205	87	220	81	250	85	330	90	283	86	252	88	240
Arkansas	169	10	183	37	187	13	189	9	190	7	191	1	194	0	193	3	192	8	4	3
California	2	5	7	75	11	364	13	354	744	1,751	718	2,052	720	1,831	719	1,749	720	1,949	722	1,943
Colorado	194	128	197	258	199	178	231	173	228	149	230	133	232	113	233	128	235	148	234	101
Connecticut	29	69	23	62	39	117	89	68	94	87	98	114	59	113	94	109	98	135	97	151
Delaware	58	29	57	47	49	33	51	42	51	45	50	67	54	58	50	19	54	37	52	34
District of Columbia	**		1	14	1	10	1	2	1	4	1	16	1	6	1	2	1	4	1	5
Florida	**	**	374	334	374	239	370	214	411	164	394	187	580	93	464	179	483	267	491	240
Georgia	2	23	4	66	4	75	3	51	3	49	2	28	5	45	58	34	56	36	80	35
Hawaii	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**	**
Idaho	98	33	115	54	110	70	117	79	116	114	112	72	119	46	120	58	121	34	118	45
Illinois	26	133	620	241	224	724	19	239	1	146	114	333	96	339	73	277	55	247	46	183
Indiana	1	0	5	19	52	82	89	32	164	35	179	36	139	62	150	50	143	111	166	106
Iowa	201	89	190	36	196	39	226	61	232	29	231	43	230	55	218	0	222	31	220	33
Kansas	3	6	2	3	1	0	**	**	**	**	1	28	1	55	1	54	1	41	1	42
Kentucky	1	0	2	5	3	13	5	4	513	81	527	109	213	48	264	45	251	71	317	73
Louisiana	6	0	10	13	58	23	92	9	146	7	140	6	147	4	134	10	172	6	174	12
Maine	**	**	9	19	6	32	5	7	130	75	131	58	131	57	133	57	165	22	181	28
Maryland	156	431	156	484	153	404	150	325	148	353	148	387	148	321	147	282	146	230	146	217
Massachusetts	30	200	158	424	135	343	**	**	202	333	405	454	359	441	177	431	303	443	341	458
Michigan	**	**	454	122	555	247	518	252	480	405	485	485	465	461	546	384	610	407	620	425
Minnesota	42	225	69	411	66	377	**	**	66	285	307	268	312	214	72	248	314	225	313	169

A= Number of agencies participating in HCSA for each state   B= Number of incidents reported by agencies in the state
** indicates "did not report"

State by State Comparison, HCSA Reporting

	1991		1992		1993		1994		1995		1996		1997		1998		1999		2000	
State	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Mississippi	4	1	1	0	17	0	53	6	51	6	129	3	75	0	90	3	88	2	78	2
Missouri	18	136	17	158	81	168	155	139	157	135	230	150	194	157	212	118	209	83	186	70
Montana	**	**	**	**	18	21	2	0	6	11	95	10	95	15	77	22	86	27	102	19
Nebraska	**	**	**	**	**	**	**	**	**	**	10	3	10	3	202	52	233	35	202	17
Nevada	1	16	3	23	9	12	5	16	35	68	4	44	34	45	35	60	37	75	37	85
New Hamsphire	**	**	**	**	1	0	2	3	2	24	2	1	**	**	57	16	86	20	110	32
New Jersey	271	895	291	1,114	317	1101	559	895	568	768	568	139	567	694	565	757	565	617	564	652
New Mexico	1	0	**	**	13	4	57	4	70	24	70	44	58	24	59	31	59	16	43	15
New York	773	943	569	1,112	571	934	567	911	520	845	499	903	502	853	500	776	506	590	539	608
North Carolina	**	**	1	1	6	10	7	7	59	52	83	34	445	42	434	39	463	31	205	31
North Dakota	**	**	1	1	91	1	82	5	74	3	101	1	84	2	81	2	84	2	80	5
Ohio	30	80	26	105	128	260	266	357	321	267	405	234	304	265	344	172	351	232	348	240
Oklahoma	7	99	9	147	9	60	4	20	7	37	293	83	300	41	25	57	300	42	301	80
Oregon	39	296	279	376	279	237	206	177	243	152	174	172	171	105	167	93	239	123	171	142
Pennsylvania	50	277	944	432	1,036	391	1,044	278	1,134	282	1,137	205	1,108	168	1,127	168	1,140	185	933	141
Rhode Island	**	**	44	48	45	62	45	37	45	46	46	40	45	43	46	29	48	41	48	48
South Carolina	**		4	4	295	27	302	30	293	26	340	42	316	71	300	94	339	52	352	33
South Dakota		**	**	**	3	4	4	1	38	5	32	3	42	34	76	19	117	14	121	7
Tennessee	2	1	2	4	56	2	113	20	104	25	191	33	167	46	260	58	355	127	422	230
Texas	28	95	870	486	879	418	895	364	914	326	915	350	924	333	931	300	939	262	942	286
Utah	**	**	9	12	121	45	123	93	116	107	124	59	124	49	101	66	122	59	127	71
Vermont	**	**	**	**	1	1	18	12	19	10	3	4	20	3	37	13	43	16	43	19
Virginia	19	53	24	102	21	100	160	95	175	51	409	92	409	105	415	160	372	203	384	325
Washington	206	196	207	374	207	457	22	281	229	226	230	198	229	190	238	221	231	230	236	242
West Virgina	**	**	**	**	**	**	**	**	**	**	22	4	32	3	112	21	249	32	268	60
Wisconsin	303	41	145	67	161	19	150	40	337	45	338	43	345	50	**	**	364	49	368	47
Wyoming			5	0	49	10	60	6	59	19	70	4	38	6	33	6	68	2	67	9

Compiled by the Anti-Defamation League's Washington Office from information collected by the FBI

Resources

These websites include outstanding resources on hate crimes laws, anti-bias and prevention programs, and links to other related sites:

- *<www.ADL.org>* (Anti-Defamation League)
- *<http://www.adl.org/learn/>* (Anti-Defamation League Law Enforcement Agency Resource Network)
- *<www.partnersagainsthate.org>* (Anti-Defamation League, Leadership Conference Education Fund, Center for the Prevention of Hate Violence)
- *<www.civilrights.org>* (Leadership Conference on Civil Rights/Leadership Conference Education Fund)
- *<www.cphv.org>* (The Center for the Prevention of Hate Violence)
- *<www.tolerance.org>* (Southern Poverty Law Center/Klanwatch)
- *<www.hrc.org>* (The Human Rights Campaign)
- *<www.theiacp.org>* (The International Association of Chiefs of Police)

Endnotes

[1] Michael Lieberman has been the Washington Counsel for the Anti-Defamation League (ADL) since Jan. 1989. He has written widely about the impact of hate crimes and has been actively involved in efforts to secure passage of a number of federal and state hate crime statutes. Mr. Lieberman has participated in seminars and workshops on response to violent bigotry and has served on Advisory Boards for hate crime projects funded by the Department of Justice, the Department of Education, and the Department of Housing and Urban Development.

The Anti-Defamation League: Since 1913, the mission of ADL has been to "stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." Dedicated to combating anti-Semitism, prejudice, and bigotry of all kinds, ADL has played a national leadership role in the development of innovative materials, programs, and services that build bridges of communication, understanding, and respect among diverse racial, religious, and ethnic groups. The League's website, <*www.adl.org*>, contains excellent background on legal and legislative response to hate violence, as well as educational resources on prevention of bias that can lead to violence.

[2] Attorney General Reno is especially deserving of high praise. Under her energetic leadership, working groups within the Department of Justice met regularly for months preceding the historic Nov. 1997 White House Conference on Hate Crimes. Justice Department working groups met repeatedly, soliciting input from government experts, law enforcement groups, academics, and civil rights activists to build on existing programs, assess future needs, and establish priorities. Most importantly, they followed up with the implementation of an ambitious and impressive series of national initiatives.

[3] This partnership between community groups and law enforcement was modeled after the Washington, D.C. Bias Crime Task Force, established in February 1996 to fight hate crimes and increase public awareness about bias-motivated crime in the nation's capital. The Task Force was founded by ADL's Washington, D.C./Maryland/Virginia/North Carolina Regional Director, David Friedman, and Eric Holder, then U.S. Attorney for the District of Columbia, who later served as Deputy Attorney General in the Clinton Justice Department.

[4] U.S. Department of Justice, Bureau of Justice Statistics, Sept. 2001.

[5] The Education Department website provides the crime statistics reported by every postsecondary institution that participates in federal financial aid programs and includes separate data for each campus. The data are categorized under one of four locations where the crime occurred: residence halls, other on-campus locations, noncampus buildings or properties, or nearby public property.

[6] Public Law 102-586.

[7] Department of Education and Department of Justice, *Preventing Youth Hate Crime: A Manual for Schools and Communities* (1997).

[8] This monograph is available at the Center for the Prevention of Hate Violence's website: <*http://www.cphv.usm.maine.edu/monograph.pdf*>.

[9] One website posting by the Traditional Values Coalition stated: "Currently, under the guise of "hate crime prevention" and "promoting tolerance," federal education dollars have provided a major funding stream to undermine and denigrate the religious beliefs of Christian parents and children. These taxpayer dollars have produced unbalanced, bigoted and offensive anti-Christian materials."

[10] Public Law 107-110.

[11] Despite the fact that a significant number of hate crimes are committed against gays and lesbians, hate crime statutes in only 27 states and the District of Columbia now include crimes directed at an individual because of his/her sexual orientation. Currently, the Justice Department has limited authority to seek enhanced penalties in bias-motivated attacks against gay men and lesbians, since sexual orientation is one of the categories included in the Hate Crime Sentencing Enhancement Act, 28 U.S.C. § 994. This authority, however, has apparently never actually been used.

[12] In the past five years, as states have realized that it is difficult to distinguish race-based and religion-based crimes from gender-based crimes, the trend in a number of state legislatures has been to include gender in hate crimes legislation. In 1990, only 7 of the statutes in the 31 states that had hate crime statutes included gender. Today, including the District of Columbia, 25 of the 45 states with penalty-enhancement hate crimes statutes include gender. Gender-based crimes are also subject to federal sentencing enhancements — although, again, apparently the enhancement has never been applied to a federal crime.

[13] The hate crime statutes in 26 states and the District of Columbia now provide enhanced penalties for disability-based crimes.

[14] For additional information about hate crime statutes across the country, including each state's breadth and coverage, see <*www.adl.org*> or <*www.partnersagainsthate.org*>.

[15] Similarly, in 1968, during the debate over 18 U.S.C. § 245, Congress had determined at that time that certain crimes directed at individuals because of "race, color, religion or national origin" required a federal remedy.

[16] Data provided by the Department of Justice as of Aug. 31, 2001.

[17] An excellent primer on the federal criminal civil rights statutes is a orientation document prepared by federal prosecutors Karla Dobinski, Tamara J. Kessler, and Suzanne K. Drouet of the Criminal Section of the Justice Department's Civil Rights Division.

[18] 28 U.S.C. § 534.

[19] The Anti-Defamation League has been compiling data on anti-Jewish vandalism and harassment since 1979. In 2000, a total of 1,606 anti-Semitic incidents from 44 states and the District of Columbia were reported to ADL regional offices across the country, representing a 4% increase from the 1999 figure of 1,547. For more information, *see* Anti-Defamation League, *2000 Audit of Anti-Semitic Incidents* (Mar. 2001) (annual report). In addition, the National Asian Pacific American Legal Consortium (NAPALC) has conducted an annual audit of anti-Asian violence since 1993. In 1999, NAPALC documented 486 anti-Asian incidents, an increase over its 1998 figure of 429. For more information, *see* National Asian Pacific American Legal Consortium, *1999 Audit of Violence Against Asian Pacific Americans* (Jan. 2000).

[20] Public Law 103-322 (Sept. 13, 1994).

[21] The separate HCSA jurisdiction-by-jurisdiction breakdown reports have been especially useful in helping to gauge the seriousness with which communities are approaching the hate crime data collection effort. For example, in 2000, the most current jurisdiction-by-jurisdiction information available, seven states (Alaska, Arkansas, the District of Columbia, Mississippi, North Dakota, South Dakota, and Wyoming) reported ten or fewer hate crime incidents. Alabama and Hawaii did not participate in the HCSA program at all. In addition, of the 50 most populous cities in the United States, 7 did not participate in the reporting of hate crime data at all: Honolulu, Toledo, Birmingham, Baton Rouge, Montgomery, Augusta/Richmond County (GA), and Mobile. Other large cities were, quite obviously, egregiously deficient in their HCSA reporting. Nashville and New Orleans each affirmatively reported zero hate crimes to the FBI. Milwaukee reported one, Oakland and Miami reported two, Detroit, Oklahoma City, and Omaha reported three, Washington, D.C., reported five, and Indianapolis, Baltimore, and Denver each reported seven. For comparison purposes, Boston, a city known for effective hate crime response — and approximately the same size as Milwaukee, Baltimore, Washington, D.C., and Nashville — reported 177 hate crimes to the FBI in 2000.

[22] An excellent primer on the federal criminal civil rights statutes is a orientation document prepared by Federal prosecutors Karla Dobinski, Tamara J. Kessler, and Suzanne K. Drouet of the Criminal Section of the Justice Department's Civil Rights Division.

[23] National Organization of Black Law Enforcement Executives (NOBLE), *Racial and Religious Violence: A Model Law Enforcement Response* (Sept. 1985) ("NOBLE report").

[24] As stated in the International Association of Chiefs of Police's National Policy Center's Apr. 1991 Concepts and Issues Paper on Hate Crime (revised in May 2000): "Swift and effective response to hate crimes helps to generate the degree of trust and goodwill between the community and its law enforcement agency that has long-term benefits for all concerned."

[25] NOBLE report at 36.

[26] For a fine review of these issues, *see* Japanese American Citizens League, *Walk With Pride — Taking Steps to Address Anti-Asian Violence* (Aug. 1991). NAPALC has also noted that a lack of bilingual police officers can exacerbate community fears and mistrust — and may contribute to an inability to initially identify a hate crime incident and create difficulties in interviewing the victim and conducting an effective investigation.

[27] Reporting rates for gay and lesbian hate crime victims are also likely affected by mistrust and fear of the police. For a particularly sobering review of these issues, *see* National Coalition of Anti-Violence Programs (NCAVP), *Anti-Lesbian, Gay, Bisexual and Transgendered Violence in 1997* ("NCAVP report"). Information gathered by NCAVP across the country indicates "a growing reluctance on the part of victims to report anti-LGBTH (Lesbian, Gay, Bisexual, Transgender, and HIV-positive) crimes to the police and an alarming increase in police indifference or hostility to those victims that did seek police assistance. The resistance of many victims to reporting is validated by the fact that there were significant increases in wrongful arrests, the number of offenders who are members of law enforcement and the number of incidents that occurred in a police precinct/jail." NCAVP report at 23.

[28] Collecting data under the HCSA — and training officers to identify, report, and respond to acts of violence based on prejudice — demonstrates a resolve to treat these inflammatory crimes seriously. These positive steps can be amplified by involving representatives of minority communities in the training sessions.

Excellent resources now exist to help municipalities establish hate crime response procedures. ADL has developed a number of hate crime training resources that are available to communities and law enforcement officials, including a comprehensive guide to hate crime laws, a new crime training video on the impact of hate crime and appropriate responses, and a handbook of existing hate crime policies and procedures at both large and small police departments. ADL's anti-bias initiatives, coordinated through our A World of Difference Institute, are most often used as proactive measures to help educators, employers, and civic leaders develop the skills, sensitivity, and knowledge to combat bigotry and encourage understanding and respect among diverse groups in the classroom and in the workplace. For more information, *see <www.adl.org>*. The League has also developed a special section of our website, the Law Enforcement Agency Resource Network, which is devoted to resources for law enforcement agencies in confronting terrorism, organized hate groups, and response to violent bigotry at *<www.adl.org/learn/>*.

[29] *Report to Congress on Juvenile Hate Crime* (July 1996).

[30] *U.S. v. Machado*, No. SA CR 96-142-AHS (Central District of California, Feb. 10, 1998).

[31] The National District Attorney's Association's American Prosecutors Research Institute has produced an excellent resource guide, which is available at *<http://www.ndaa-apri.org/publications/apri/hate_crimes.html>* and *<http://www.ndaa-apri.org/publications/apri/hate_crimes.html>*.

[32] CRS has determined that anti-Semitism can be defined as conflict based on national origin or race and has offered its services in attacks or threats against Jews and Jewish institutions. In addition, CRS has responded to intercommunal violence directed at individuals on the basis of their sexual orientation on at least one occasion. On Feb. 17, 1994, Attorney General Reno exercised her authority under 28 U.S.C. § 509-510 to direct CRS to intervene in a community dispute involving a campaign of terror and harassment against a lesbian couple in Ovett, Mississippi. CRS has also provided both valuable staff assistance and significant funding for the inclusive hate crimes outreach and training programs developed by the FBI and the Treasury Department's Federal Law Enforcement Training Center (FLETC), as well as the comprehensive training curricula developed by the Department of Justice.

[33] American Psychological Association, *Violence and Youth: Psychology's Response* (1993). The APA report asserts that education programs that reduce prejudice and hostility are integral components of plans to address youth violence. The report concludes that conflict resolution and prejudice reduction programs can provide needed information and skills to prevent youth violence.

[34] There are many existing programs designed to address prejudice. For example, ADL's A World of Difference Institute, founded in Boston in 1985 and now operating in over 30 cities, provides training and educational programming about the roots and consequences of prejudice. A World of Difference combines specially produced television programming, public service announcements, teacher training, curriculum materials, community-based projects, and video resource materials designed to help children and adults explore issues of prejudice and diversity. To date, more than 400,000 elementary and secondary school teachers nationwide have been trained to address prejudice and to better value diversity.

[35] Many of the League's best programs and hate crime prevention initiatives are highlighted in *Hate Crimes: ADL Blueprint for Action*, a publication originally prepared for distribution at the 1997 White House Conference on Hate Crime and recently updated and expanded.

[36] In 1993, the Commerce Department's National Telecommunications and Information Administration (NTIA) published an early study on the connection between broadcast hate and hate violence (National Telecommunications and Information Administration, U.S. Department of Commerce, *The Role of Telecommunications in Hate Crimes* (Dec. 1993)). The issue of the impact of hate on the Internet is worthy of further study. The global nature of the Internet

permits the Web to reach a worldwide audience — in a simple and inexpensive manner. Many traditional hate groups, like the Ku Klux Klan and other white supremacist groups, have already established anonymous fundraising and propaganda websites, many designed to appeal to young, impressionable youth.

While the use of the Internet by cyberhaters, racists, Holocaust deniers, and organized hate groups is disturbing, ADL believes strongly that censorship is not the best way to confront these messages. Rather, the Internet must be closely monitored, with people of goodwill and organizations exposing bigots and countering lies and distortions with accurate information. For more information on this issue, see Anti-Defamation League, *Poisoning the Web: Hatred Online* (1999), and Anti-Defamation League, *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech* (2000).

Chapter 14

Racial Disparities in the American Criminal Justice System

by Ronald Weich and Carlos Angulo*

Introduction

In many ways, the United States has made significant progress over the last half century toward the objective of ensuring equal treatment under law for all citizens. But in one critical arena — criminal justice — racial inequality is growing, not receding. Our criminal laws, while facially neutral, are enforced in a manner that is massively and pervasively biased. The injustices of the criminal justice system threaten to render irrelevant 50 years of hard-fought civil rights progress.

- In 1964 Congress passed the Civil Rights Act prohibiting discrimination in employment. Yet today, three out of every ten African American males born in the United States will serve time in prison, a status that renders their prospects for legitimate employment bleak and often bars them from obtaining professional licenses.

- In 1965 Congress passed the Voting Rights Act. Yet today, 31% of all black men in Alabama and Florida are permanently disenfranchised as a result of felony convictions. Nationally, 1.4 million black men have lost the right to vote under these laws.

- In 1968 Congress passed the Fair Housing Act. Yet today, the current housing for approximately 2 million Americans — two-thirds of them African American or Hispanic — is a prison or jail cell.

- Our civil rights laws abolished Jim Crow laws and other vestiges of segregation and guaranteed minority citizens the right to travel and utilize public accommodations freely. Yet today, racial profiling and police brutality make such travel hazardous to the dignity and health of law-abiding black and Hispanic citizens.

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*This chapter is adapted from a report the authors prepared for the Leadership Conference on Civil Rights and the Leadership Conference Education Fund entitled *Justice on Trial: Racial Disparities in the American Criminal Justice System* (2000). Ronald Weich is a partner in the Washington, D.C., law firm of Zuckerman Spaeder LLP. He previously served as an Assistant District Attorney in New York County, Special Counsel to the U.S. Sentencing Commission, and Chief Counsel to Senator Edward M. Kennedy on the U.S. Senate Judiciary Committee. Carlos Angulo is an associate at Zuckerman Spaeder LLP. He previously served in the Department of Justice and as Counsel to Senators Paul Simon and Paul Sarbanes.

The system by which lawbreakers are apprehended and punished is one of the pillars of any democracy. But for that system to remain viable, the public must be confident that at every stage of the process — from the initial investigation of a crime by the police officer walking a beat to prosecution and punishment — individuals in like circumstances are treated alike, consistent with the Constitution's guarantees of equal treatment under the law.

Today, our criminal justice system strays far from this ideal. Blacks, Hispanics and other minorities are victimized by disproportionate targeting and unfair treatment by police and other front-line law enforcement officials; by racially skewed charging and plea bargaining decisions of prosecutors; by discriminatory sentencing practices; and by the failure of judges, elected officials, and other criminal justice policymakers to redress the inequities that become more glaring every day.

Racial disparities affect both innocent and guilty minority citizens. There is obvious reason to be outraged by the fact that innocent minority citizens are detained by the police on the street and in their cars far more than whites. But there must also be outrage about the disparate treatment of minority citizens who have violated the law. A defendant surrenders many civil rights upon conviction, but equal protection of the laws is not one of them.

The unequal treatment of minorities in our criminal justice system manifests itself in a mushrooming prison population that is overwhelmingly black and Hispanic; in the decay of minority communities that have given up an entire generation of young men to prison; and in a widely held belief among black and Hispanic Americans that the criminal justice system is deserving neither of trust nor of support.

Enforcement of criminal laws based on racial generalizations is not rational: The majority of crimes are not committed by minorities, and most minorities are not criminals — indeed, less than 10% of all black Americans are even arrested in a given year. Yet the unequal targeting and treatment of minorities at every stage of the criminal justice process — from arrest to sentencing — reinforces the perception that drives the inequality in the first place, with the unfairness at every successive stage of the process compounding the effects of earlier injustices. The result is a vicious cycle that has evolved into a self-fulfilling prophecy: More minority arrests and convictions perpetuate the belief that minorities commit more crimes, which in turn leads to racial profiling and more minority arrests.

Racial disparity in the criminal justice system may be the most profound civil rights crisis facing America in the new century. It undermines the progress we have made over the past five decades in ensuring equal treatment under the law and calls into doubt our national faith in the rule of law.

This chapter examines the systematically unequal treatment of black and Hispanic Americans and other minorities as compared to their similarly situated white counterparts within the criminal justice system. But it does not propose less public safety or ineffective law enforcement. The issue is not whether to be *tough* on crime, but rather whether to be *fair* and *smart* in the course of being tough on crime. *There is no contradiction between effective law enforcement and the promotion of civil rights.*

I. Race and the Police

The disparate treatment of minorities in the American criminal justice system begins at the very first stage of that system: the investigation of suspected criminal activity by law enforcement agents. Police departments disproportionately target minorities as criminal suspects, skewing at the outset the racial composition of the population ultimately charged, convicted and incarcerated. And too often the police employ tactics against minorities that simply shock the conscience.

There is no reason to believe that overt racism or bigotry is more prevalent among police officers than among other professionals. To be sure, there have been highly publicized instances of such bigotry, such as the annual "Good Ol' Boys Roundup" for law enforcement personnel in eastern Tennessee, which, when investigated in 1995, was found to feature a Redneck of the Year contest, performances in blackface, the wearing of masks in the likeness of Martin Luther King, Jr., with a bullet hole in the face, and the display of a banner entitled "Nigger Check Point." But such blatant prejudice is always roundly condemned when it comes to light. In contrast, the racial generalizations that inform policing strategies in America today are subtle, deeply rooted, and difficult to eradicate.

A. Racial Profiling and the Assumptions That Drive It

Some crimes are brought to the attention of the police by circumstances (e.g., a dead body) or by bystanders who witness it. But very often the police seek to uncover criminal activity by investigation. They patrol the streets looking for activity they think is suspicious, they stop cars for traffic violations in the hope of discovering more serious criminality, and they engage in undercover operations in an effort to uncover crimes, like drug trafficking and prostitution, without complaining witnesses. Each of these police tactics involves the exercise of a substantial amount of discretion — the police decide who they consider suspicious, which cars to tail, what conduct warrants further investigation, and which neighborhoods are ripe for enforcement activity.

Unfortunately, that discretion is routinely exercised through the prism of race. The practice of racial profiling — that is, the identification of potential criminal suspects on the basis of skin color or accent — is pervasive.

For example, a growing body of statistical evidence demonstrates that black motorists are disproportionately stopped for minor traffic offenses because the police assume that they are more likely to be engaged in more serious criminal activity. This ironically labeled "driving while black" syndrome[1] has two deleterious effects. It causes a large number of innocent black drivers to be subjected to the hassle and humiliation of police questioning, and it results in a lopsided number of blacks being arrested for nonviolent drug crimes that would not come to the attention of authorities but for the racially motivated traffic stop.

The practice is widespread:

- Under a federal court consent decree, traffic stops by the Maryland State Police on Interstate 95 were monitored. In the two-year period from January 1995 to December 1997, 70% of the drivers stopped and searched by the police were black, while only 17.5% of overall drivers — as well as overall speeders — were black.[2]

- In Volusia County, Florida, in 1992, nearly 70% of those stopped on a particular Interstate highway in central Florida were black or Hispanic, although only 5% of the drivers on that highway were black or Hispanic. Moreover, minorities were detained for longer periods of time per stop than whites, and were 80% of those whose cars were searched after being stopped.[3]

- A study of traffic stops on the New Jersey Turnpike found that 46% of those stopped were black, although only 13.5%

of the cars on the road had a black driver or passenger and although there was no significant difference in the driving patterns of white and non-white motorists.[4]

- In 1992, as part of a report by the ABC news program "20/20," two cars, one filled with young black men, the other with young white men, navigated the same route, in the same car, at the same speed through Los Angeles streets on successive nights. The car filled with young black men was stopped by the police several times; the white group was not stopped once, despite observing police cars in their immediate area at least 16 times during the evening.[5]

Even the United States government has facilitated racial profiling. The Volusia County highway interdiction program discussed above is part of a network of drug interdiction programs established and funded by federal authorities under the name "Operation Pipeline." And it was the Drug Enforcement Agency that encouraged New Mexico state police to use a "cocaine courier profile," one element of which was that "[t]he vehicle occupants are usually resident aliens from Colombia."[6]

The immigration law context furnishes further evidence of widespread racial profiling. A recent study by the National Council of La Raza identified a pattern of selective enforcement of U.S. immigration laws by the Immigration and Naturalization Service (INS) and local officials, whereby individuals of identifiably Hispanic origin — including many who were American citizens, legal permanent residents, or otherwise lawfully in the United States — were targeted by the authorities and subjected to interrogation, detention, or arrest for suspected immigration violations.

One of many examples of such targeting was "Operation Restoration" in Chandler, Arizona, a joint endeavor of the Chandler Police Department and the U.S. Border Patrol. According to a study conducted by the Arizona Attorney General's office, local police and U.S. Border Patrol officials implementing Operation Endeavor "without a doubt . . . stopped, detained, and interrogated [Chandler residents] . . . purely because of the color of their skin."[7] Similarly, in Katy, Texas, the INS and officers from the Katy Police Department conducted a joint operation whereby they stopped and detained cars driven by individuals of "Hispanic appearance," conducted street sweeps in which Hispanics were the only ones targeted or questioned, and undertook searches of Hispanic residences.[8]

Racial profiling is seemingly inconsistent with today's dominant law enforcement philosophy: community policing. But community policing is still a vague and elastic concept. At its best, community policing refers to a more diverse police force working with community institutions to prevent crime before it occurs. For example, Boston's anti-gang efforts have featured after-school programs for high-risk students and a constructive partnership between the police and crime prevention agencies. In such places, community policing deserves credit for helping to reduce crime rates.

But too often, community policing is just a label, a slogan to attract federal grants and favorable headlines. In some jurisdictions, community policing means little more than giving street-level officers wide discretion to "clean up" the communities they patrol by whatever means seem expedient. Thus, community policing may come to mean "quality of life" policing, under which the police adopt a zero-tolerance approach to minor violations of law. Such an ends-justify-the-means approach invariably works to the detriment of — and is disproportionately targeted at — black and Hispanic populations. Professor David Cole has pointed out that such an enforcement strategy "relies heavily on inherently discretionary police judgments about which communities to target, which individuals to stop, and whether to use heavy-handed or light-handed treatment for routine infractions."[9] According to Professor Angela Davis, "[t]he practical effect of this deference [to law enforcement discretion] is the assimilation of police officers' subjective beliefs, biases, hunches, and prejudices into law,"[10] and the evidence suggests that such discretion is exercised to the detriment of America's minorities.

Some continue to defend racial and ethnic profiling by law enforcement as a rational response to patterns of criminal conduct. Such arguments rest implicitly or explicitly on two basic assumptions, each of which is flawed, pernicious, and divisive.

The first assumption is that minorities commit the majority of crimes and that therefore it is a sensible use of police resources to focus on the behavior of those individuals. This attitude was epitomized by Carl Williams, Superintendent of the New Jersey State Police until his dismissal in March 1999, who stated in defense of racial profiling that "mostly minorities" traffic in marijuana and cocaine.[11] Superintendent Williams' assumption, shared by many, is flatly incorrect with respect to those crimes most commonly investigated through racial profiling — drug crimes.[12] Blacks commit drug offenses at a rate proportional to their percentage of the U.S. population: black Americans represent approximately 12 to 13% of the U.S. population, and, according to the most recent federal statistics, 13% of all drug users.[13] And for the past 20 years, drug use rates among black youths have been consistently *lower* per capita than drug use rates among white youths.[14]

Findings related to the "driving while black" phenomenon and other forms of racial profiling lead to the same conclusion. While black motorists were disproportionately stopped by Maryland State Police on I-95, the instances in which drugs were actually discovered in the stopped vehicles were the same per capita for black and white motorists. Similarly, a nationwide study by the U.S. Customs Service revealed that while over 43% of those subjected to searches as part of the Service's drug interdiction efforts were black or Hispanic, the "hit rates" for those groups per capita were lower than for white Americans.[15] And according to the congressional General Accounting Office (GAO), while black female U.S. citizens were *nine times* more likely to be subjected to x-ray searches by U.S. Customs Officials than white female U.S. citizens, these black women were less than half as likely to be found carrying contraband as white females.[16]

The harms caused by racial profiling extend beyond racial division and distrust. In effect, racial profiling becomes a self-fulfilling prophecy. As noted by Professor David Harris, a leader in identifying the "driving while black" phenomenon:

> *Because police will look for drug crime among black drivers, they will find it disproportionately among black drivers. More blacks will be arrested, prosecuted, convicted, and jailed, thereby reinforcing the idea that blacks constitute the majority of drug offenders. This will provide a continuing motive and justification for stopping more black drivers as a rational way of using resources to catch the most criminals.*[17]

And, indeed, this prophecy has come to pass. Despite the fact that, as noted earlier, blacks are just 12% of the population and 13% of the drug users, and despite the fact that traffic stops and similar enforcement strategies yield equal arrest rates for minorities and whites alike, blacks are 38% of those arrested for drug offenses and 59% of those convicted of drug offenses.[18] Moreover, more frequent stops, and therefore arrests, of minorities will also result in longer average prison terms for minorities because patterns of disproportionate arrests generate more extensive criminal histories for minorities, which in turn influence sentencing outcomes.[19]

B. Violent Consequences of Race-Based Policing

Police tactics based on racial assumptions are not only unfair to minorities; they actually place minorities in physical danger. In recent years, several highly publicized police shootings appeared to result from the police acting on unjustified racial generalizations.

Amadou Diallo was a young black man living in a predominantly minority neighborhood in New York City. On the night of February 4, 1999, Diallo was approached by four police officers as he stood by the front steps of his apartment building. He reached for his wallet to produce identification. The officers mistook this action as reaching for a weapon and fired 41 gunshots, killing Diallo.

On March 16, 2000, soon after the officers who shot Amadou Diallo were acquitted of criminal charges, a 26-year-old black man named Patrick Dorismond was trying to hail a cab on a midtown Manhattan street corner when he was approached by three undercover police officers who, without apparent reason to believe that Dorismond was a drug dealer, tried to buy drugs from him. Dorismond became angry, and in the ensuing fight Dorismond was shot and killed by the police.[20]

Hispanics have also been the victims of violence associated with racial profiling. On April 25, 1997, a factory in Salt Lake City owned by an American citizen, Rafael Gomez, was the subject of a police raid in which 75 heavily armed police officers brandished rifles and pistols, struck Gomez in the face with a rifle butt, pointed a gun at his six-year-old son, ordered the 80 factory employees to lie down on the floor, and dragged Gomez' secretary across a room by her hair. The raid, based on an anonymous tip, uncovered no illegal activity.[21]

In each case the questions linger: Would Diallo's actions have generated suspicion if he had not been black, and would the officers who shot him have seen a gun where there was only a wallet if he had been white? Would the officers who approached Dorismond simply have left him alone, or walked away from a fight, if Dorismond had not been of Haitian descent? Would an anonymous tip about a white business owner been treated like the tip that caused an armed raiding party to descend on Rafael Gomez?

There is little doubt that these tragedies were the consequence of a law enforcement culture that encourages suspicion of minorities. The same assumptions that lead police to engage in disproportionate stops of minority drivers and minority pedestrians led police to assume the worst about Diallo, Dorismond, and Gomez. These cases made headlines in the cities in which they occurred. Countless incidents that do not result in death or wildly unsuccessful police raids occur every day and escape public notice. But they contribute to a well-grounded fear among minorities that the police will assume the worst about them, and on a dark street corner that assumption can be fatal.

C. Race and Police Misconduct

The unequal treatment of minorities by law enforcement officials extends beyond racially based traffic stops and profiling. Minority citizens are also the prime victims of police brutality and corruption. Such misconduct is unacceptable in any form, but it is doubly offensive when it flows from attitudes about race that are contrary to our commitment to equal justice and the rule of law.

In Los Angeles, authorities uncovered massive police corruption centered in the anti-gang unit of the Rampart division — a police station located in one of the city's poorest neighborhoods. The investigation revealed that officers in that unit manufactured evidence and perjured themselves to produce convictions, thousands of which could be affected by the revelations; routinely engaged in police brutality to intimidate their victims; participated in the drug trade; and used the Immigration and Naturalization Service to deport anti-police witnesses, in violation of Los Angeles city policy.[22] As part of their abuse of the immigration laws, the officers allegedly compiled a list of more than 10,000 Hispanics whom they believed to be deportable, effectively placing an entire community under suspicion on the basis of its racial composition.

General patterns of misconduct similar to the Los Angeles scandal have been revealed in New York, where the Mollen Commission uncovered widespread brutality and corruption in the Bronx directed largely at blacks and Hispanics, and in Philadelphia, where similar patterns of misconduct were found to persist in the predominantly black neighborhood of North Philadelphia. To name these cities is not to ignore the breadth of police abuse and misconduct that occurs throughout the country. Indeed, in a nationwide poll, 59% of respondents believed that police brutality is common in some or most communities in the United States, and 53% of respondents believed that police are more likely to use excessive force against black or Hispanic suspects than against white suspects.[23]

Practices like racial profiling and the actions uncovered by the Mollen Commission and in the Rampart investigations are related. First, they all proceed in large part from the twin misperceptions that (1) blacks and Hispanics commit most crimes, and (2) most blacks and Hispanics commit crimes — misperceptions that have justified everything from pretextual traffic stops to the entirely unjustified beatings and abuse of innocent individuals.[24] Second, both profiling and police misconduct contribute to the belief — shared to one degree or another by Americans of all races and ethnicities — that the police do not treat black and Hispanic Americans in the same manner as they do white Americans, and that the promise of fair treatment enshrined in the Constitution has limited application when police confront a black or brown face.

II. Race and Prosecutorial Discretion

Racial profiling and other enforcement strategies begin the insidious process by which minorities are disproportionately caught up in the criminal justice system. But such disparities do not end at the point a suspect is arrested. At every subsequent stage of the criminal process — from the first plea negotiations with a prosecutor to the imposition of a prison sentence by a judge — the subtle biases and stereotypes that cause police officers to rely on racial profiling are compounded by the racially skewed decisions of other key actors.

Prosecutors occupy a central role in American criminal justice. They represent the public in the solemn process of holding accountable those who violate society's rules. That task carries with it substantial unchecked discretion. The threshold decision of whether to bring charges against a suspect, and, if so, which charges are appropriate, is almost never subject to review by a court. The subsequent decision to enter into a plea agreement is reviewable at the margins because courts may reject plea agreements under certain circumstances. But in practice, prosecutors decide who will be granted the leniency that a plea bargain represents.

Prosecutorial discretion is most dramatically exercised in the area of sentencing. Traditionally, sentencing has been a judicial prerogative, but, as will be explained, the advent of mandatory minimum sentencing laws and sentencing guideline systems has shifted in large measure the power to determine punishment from judge to prosecutor. Even where judges retain ultimate authority to impose sentence, a prosecutor's sentencing recommendation will carry great weight. Prosecutors today enjoy more power over the fate of criminal defendants than at any time in our history.[25]

Regrettably, the evidence is clear that prosecutorial discretion is systematically exercised to the disadvantage of black and Hispanic Americans. Prosecutors are not, by and large, bigoted. But as with police activity, prosecutorial judgment is shaped by a set of self-perpetuating racial assumptions.

A. The Decision To Prosecute

The first and most basic prosecutorial decision is whether to pursue a particular criminal case at all.[26] Prosecutors have the authority to decline prosecution altogether, or to authorize diversion, under which completion of drug treatment or community service results in the dismissal of the charges. But such displays of prosecutorial mercy appear to be exercised in a manner that disproportionately benefits whites.

In 1991 the *San Jose Mercury News* reviewed almost 700,000 criminal cases from California between 1981 and 1990 and uncovered statistically significant disparities at several different stages of the criminal justice process. Among the study's findings was that 6% of whites, as compared to only 4% of minorities, won "interest of justice" dismissals, in which prosecutors dropped a criminal case entirely. Moreover, the study found, 20% of white defendants charged with crimes providing for the option of diversion received that benefit, while only 14% of similarly situated blacks and 11% of similarly situated Hispanics were placed in such programs.[27]

Related to the decision to decline prosecution is the decision to charge the defendant in state or federal court. This choice is presented when jurisdiction over the crime resides concurrently in state and federal court, as in many drug cases. The police may make an initial decision of whether to bring the evidence to state or federal prosecutors (a discretionary call that may itself be influenced by racial considerations), but the authority to determine that a defendant will be federally prosecuted rests with federal prosecutors. Typically they will decline to prosecute the defendant in federal court if the case does not seem "serious" enough or if the defendant does not seem to pose a significant threat to public safety. Obviously these are not scientific judgments — rather they are exercises of discretion informed by predictions, hunches, and preconceptions, some of which are racially tinged.

The decision of whether to prosecute a drug case in federal court has important consequences for the defendant because federal sentences are notoriously harsher than state sentences. Federal parole was abolished in 1987, and federal drug convictions frequently result in lengthy, mandatory sentences. Moreover, if the prosecutor includes in the indictment charges carrying mandatory penalties and then refuses to permit a plea to other charges, the defendant has no opportunity to undergo drug treatment as an alternative to imprisonment, since federal law does not offer judges that option. According to the U.S. Sentencing Commission, federal courts in 1990 sentenced drug traffickers to an average of 84 months in prison, without possibility of parole. By contrast, state courts in 1988 sentenced drug traffickers to an average *maximum* sentence of 66 months, resulting in an average time served of only 20 months.[28]

That the prosecutorial decision to bring charges in federal, rather than state, court is often exercised to the detriment of minorities is best demonstrated by statistics on crack cocaine prosecutions. In 1986 Congress enacted especially harsh mandatory minimum penalties for these offenses. From 1988 to 1994, hundreds of blacks and Hispanics — but no whites — were prosecuted by the United States Attorney's office with jurisdiction over Los Angeles County and six surrounding counties.[29] The absence of white crack defendants in federal court could not be ascribed to a lack of whites engaged in such conduct; during the 1986–1994 period, several hundred whites were prosecuted in California state court for crack offenses.[30]

National statistics tell the same story: From 1992 to 1994, approximately 96.5% of all federal crack prosecutions were of nonwhites. A 1992 U.S. Sentencing Commission Report determined that *only* minorities were prosecuted for crack offenses in over half of the federal judicial districts that handled crack cases. And during that period, in New York, Texas, California, and Pennsylvania combined, eight whites were convicted of crack offenses; the number of white crack defendants convicted in Denver, Boston, Chicago, Miami, Dallas, and Los Angeles combined was zero, compared to thousands of convictions of black and Hispanic crack offenders.[31]

These discrepancies are remarkable because the crack epidemic knew no racial bounds. Despite stereotypes perpetuated by the media and popular culture, government statistics show that more whites overall used crack than blacks. According to the National Institute on Drug Abuse, between 1991 and 1993 whites were twice as likely to have used crack nationwide as blacks and Hispanics combined. Crack use was somewhat more concentrated in minority communities, but in Los Angeles, for example, whites comprised more than 50% of those who had ever used crack and about one-third of those who could be termed "frequent users."[32]

The reality is that many black defendants prosecuted in federal court are not high-volume traffickers. According to Los Angeles federal district judge J. Spencer Letts, "those high in the chain of drug distribution are seldom caught and seldom prosecuted." U.S. District Court Judge Consuelo B. Marshall has observed: "We do see a lot of these [crack] cases and one does ask why some are in state court and some are being prosecuted in federal court . . . and if it's not based on race, what's it based on?"[33]

The crack/powder cocaine sentencing divide remains unresolved. In 1995, the U.S. Sentencing Commission recommended to Congress that the sentencing guidelines be altered to eliminate the differences in crack and cocaine sentencing thresholds, noting both the inequality inherent in these differences and the cynicism they engender in minority communities.[34] Nonetheless, President Clinton proposed, and Congress passed, legislation rejecting the Commission's proposed changes.[35] The Commission has since revisited the issue and has recommended a reduction, not an elimination, in the current 100-to-1 disparity, noting again that "[t]he current penalty structure results in a perception of unfairness and inconsistency."[36] Congress has never acted on this recommendation.

B. Charging Decisions and Plea Bargaining

Once a prosecutor decides to bring charges against an individual, plea negotiations present the next opportunity for a prosecutor to grant some degree of leniency to a defendant or to insist on maximum punishment.[37] Prosecutors have virtually unlimited discretion to enter into an agreement by which the defendant will plead guilty in exchange for the dismissal of certain charges or a reduced sentence, and once again the exercise of discretion is characterized by racially disparate results.[38]

The *San Jose Mercury News* report discussed above revealed consistent discrepancies in the treatment of white and non-white criminal defendants at the pretrial negotiation stage of the criminal process. During 1989-1990, a white felony defendant with no criminal record stood a 33% chance of having the charge reduced to a misdemeanor or infraction, compared to 25% for a similarly situated black or Hispanic. Between 1981 and 1990, 50% of all whites who were arrested for burglary and had one prior offense had at least one other count dismissed, as compared to only 33% of similarly situated blacks and Hispanics. Blacks charged with a single offense received sentencing enhancements in 19% of the cases, whereas similarly situated whites received such enhancements in only 15% of the cases.[39]

Statistics from other jurisdictions confirm that prosecutorial discretion may result in disparate treatment of minorities and whites. The state of Georgia has a "two strikes, you're out" law, under which a life sentence may be imposed for a second drug offense. Under the Georgia scheme, the state's district attorneys have unfettered discretion to seek this penalty. As of 1995, life imprisonment under the "two strikes" law had been imposed on 16% of eligible black defendants, while the same sentence had been imposed on only 1% of eligible white defendants. Consequently, 98.4% of those serving life sentences under Georgia's "two strikes, you're out" law are black.[40]

Statistics in federal court mirror the experiences in these states. A U.S. Sentencing Commission report found that, for comparable behavior, prosecutors offered white defendants plea bargains that permitted the imposition of sentences below what would otherwise be the statutory minimum more often than they offered such deals to blacks or Hispanic defendants.[41]

C. Bail

Another turning point in the criminal justice process, one that can mean the difference between freedom and incarceration for criminal defendants, is bail determination. While the decision to set bail is ultimately a judicial function, prosecutors play an important role in determining whether a criminal defendant will be released on bail or detained in jail prior to trial by recommending detention or release.

A New York State study examined the extent to which black and Hispanic criminal defendants were treated differently from similarly situated white criminal defendants with respect to pretrial detention and concluded that, statewide, minorities charged with felonies were detained more often than white defendants charged with felonies. Indeed, the study found that 10% of all minorities held in jail at felony indictment in New York City, and 33% of all minorities held in jail at felony indictment in the rest of New York State, would be released before arraignment if minorities were detained as often as comparably situated whites.[42]

Another study reviewed bail determinations for criminal defendants in New Haven, Connecticut, and concluded that the bail rates set for black defendants exceeded those set for similarly situated white defendants. In short, the study concluded, lower bail rates could have been set for black defendants without incurring the risk of flight that bail rates are designed to avoid.[43] And federal statistics indicate that while non-Hispanics are likely to be released prior to trial in 66% of cases, Hispanics are likely to be released only 26% of the time.[44]

Bail status not only determines whether the defendant is to be incarcerated before trial, it also bears on the likelihood of conviction. Although jurors are not supposed to know whether the defendant has been jailed before trial, they can often discern the defendant's bail status and are more likely to convict a defendant who has already been incarcerated.[45] Here again, one racial disparity begets disparity further along in the justice system.

D. The Death Penalty

Thirty-eight states and the federal government authorize capital punishment. In each of those jurisdictions it is the prosecutor who makes the critical decision of whether or not to seek death. That decision is guided somewhat by statutory aggravating and mitigating factors, but many of these factors, such as the heinousness of the crime, are subjective. Judges and juries may eventually reject a prosecutor's request that the death penalty be imposed, but prosecutors alone decide whether death is an option.[46]

The importance of race as a factor in the imposition of capital punishment is well documented. First, the evidence reveals disparity in the application of the death penalty depending on the race of the *victim*. Individuals charged with killing white victims are significantly more likely to receive the death penalty than individuals charged with killing non-white victims. Of numerous studies of death penalty outcomes reviewed by the GAO, 82% found that imposition of the death penalty was more likely in the case of a white victim than in the case of a black victim.[47] One of the most thorough death penalty studies, conducted by Professors David Baldus, Charles Pulaski, and George Woodworth, found that defendants charged in Georgia with killing white victims were 4.3 times more likely to receive the death penalty than defendants charged with killing black victims.[48] The Baldus study also found that more than 50% of those sentenced to death for killing a white person would not have received the death penalty had they killed a black person.[49]

Second, while some of the evidence concerning the death penalty reveals that the race of the defendant alone does not result in unwarranted disparity,[50] other evidence is to the contrary. It is at least true that the race of the defendant, when *combined with the race of the victim*, yields significant disparities in the application of the death penalty. The Baldus study concluded that blacks who killed whites were sentenced to death 22 times more frequently than blacks who killed blacks and seven times more frequently than whites who killed blacks. Again, this discrepancy appears to hinge on the exercise of prosecutorial discretion. Georgia prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims, while seeking the death penalty in only 19% of the cases involving white defendants and black victims and only 15% of the cases involving black defendants and black victims.[51]

Statistics on the imposition of the federal death penalty are similarly disturbing. In 1988, Congress enacted the first federal death penalty provision in the aftermath of *Furman*. The 1988 law authorized the death penalty for murders committed by those involved in certain drug-trafficking activities under 21 U.S.C. § 848. From 1988 to 1994, 75% of those convicted under 21 U.S.C. § 848 were white. However, of those who were the subject of death penalty prosecutions under that law in the same period, 89% were Hispanic or black (33 out of 37) and only 11% (4 out of 37) were white.[52]

It appears that race explicitly influences the administration of capital punishment in some jurisdictions. The recent case of *Saldano v. Texas* presents an astonishing example of race-based sentencing and the self-perpetuating nature of racial disparities in the criminal justice system. At the capital sentencing hearings for Saldano and other defendants, Texas prosecutors relied upon the expert opinion of a psychiatrist who, according to the Texas Court of Criminal Appeals:

> *[T]estified about statistical factors which have been identified as increasing the probability of future dangerousness. He noted that African Americans and Hispanics are over-represented in prisons compared to their representation outside of prison [and] testified that because appellant is Hispanic, this was a factor weighing in the favor of future dangerousness.*[53]

The Texas courts found that this testimony was not fundamental error and upheld Saldano's death sentence, but the U.S. Supreme Court vacated the judgment after Texas conceded error.[54]

It is undeniable that prosecutors exercise their discretion in capital and noncapital cases in ways that cause racially disproportionate outcomes. Even if *Saldaño* is an aberration and most cases do not involve explicit racism, such unfairness may ultimately be more dangerous than explicitly racist behavior, since it is harder to detect (both by victim and perpetrator) and harder to eradicate than the blatant racism most Americans have learned to reject as immoral.[55]

III. Race and Sentencing

Sentencing is arguably the most important stage of the criminal justice system. While policing strategies help determine who will be subjected to the criminal process in the first place, and prosecutorial choices help determine who will be granted leniency from the full force of the law, sentencing is where those earlier decisions bear fruit.

A. Brief History of U.S. Sentencing Policy

In the late 18th and early 19th century, federal and state legislators typically set mandatory penalties for violations of law. But more enlightened penological views soon gained favor, and judges were granted discretion to sentence offenders to a range of punishments depending upon the severity of the crime and the character of the defendant.

At several points in this century, most recently in the mid-1980s, Congress and many state legislatures have enacted laws to deny judges sentencing discretion. These laws establish a minimum penalty that the judge must impose if the defendant is convicted under particular provisions of the criminal code. Mandatory sentencing laws are generally premised on the view that punishment and incapacitation, not rehabilitation, is the primary goal of the criminal justice system.

While they deprive judges of their traditional authority to impose just sentences, such mandatory minimum sentencing laws are not truly mandatory because they provide opportunities for prosecutors to grant exceptions to them. Prosecutors can choose to charge particular defendants with offenses that do not carry mandatory penalties, or they can agree to a plea agreement in which the charges carrying mandatory penalties will be dismissed. Under federal law only the prosecutors may grant a departure from mandatory penalties by certifying that the defendant has provided "substantial assistance" to law enforcement.[56]

Mandatory minimum laws embody a dangerous combination. They provide the government with unreviewable discretion to target particular defendants or classes of defendants for harsh punishment. But they provide no opportunity for judges to exercise discretion on behalf of defendants in order to check prosecutorial discretion. In effect, they transfer the sentencing decision from impartial judges to adversarial prosecutors, many of whom lack the experience that comes from years on the bench.

At the same time that mandatory sentencing laws came back into vogue in the mid-1980s, a separate movement to establish sentencing guidelines gained favor. Guidelines are a middle ground between unfettered judicial discretion and mandatory penalties. These laws, such as the Sentencing Reform Act of 1984 at the federal level, establish a centralized commission to set a presumptive sentencing range and to enumerate sentencing factors that a judge must consider. But they permit judges to depart upward or downward based on unusual factors in an individual case.

Interestingly, some supporters of civil rights championed mandatory sentencing and guideline sentencing as an antidote to perceived racial disparities in sentencing.[57] But the evidence is clear that minorities fare much worse under mandatory sentencing laws and guidelines than they did under a system favoring judicial discretion. By depriving judges of the ultimate authority to impose just sentences, mandatory sentencing laws and inflexible guideline systems put sentencing on autopilot.

The mandatory sentencing movement reached its apex in the mid-1990s when Congress and many states adopted so-called "3 strikes, you're out" laws. Under these statutes, defendants with two prior criminal convictions can be sentenced to life in prison, even if their third "strike" is for relatively minor conduct. Some states, such as Georgia, have enacted even harsher "2 strikes" laws. But again, these mandatory laws are typically invoked by prosecutors who have substantial discretion in choosing which defendants to single out for grossly disproportionate punishments. Once the "3 strike" or "2 strike" statute is invoked, there is often nothing a judge can do to ameliorate the harsh punishment that the legislature has authorized the prosecutor to demand.

The final policy development that has transformed sentencing in the last two decades is the abolition of parole in the federal system and in many states. Indeterminate sentencing, in which parole boards exercised discretion to release defendants from prison based on rehabilitation and good behavior, has been discarded in favor of "truth-in-sentencing." Sentencing is now generally mandatory, determinate, and harsh, a volatile mix that has led to dramatically increased prison populations.

B. The Result of Tough-on-Crime Sentencing Policies

Some politicians treat sentencing policy as an opportunity for demagoguery, but the combined effect of the various sentencing laws enacted in the past three decades is anything but rhetorical. In 1972, the population of federal and state prisons combined was approximately 200,000. By 1997, the prison population approached 1.2 million, an increase of almost 500%. Similar developments at the local level led to an increase in the jail population from 130,000 to 567,000. Thus, America now houses some 2 million people in its federal and state prisons and local jails.[58]

Prison and jail populations have not only swelled in the last 30 years, they have also changed in character. As a result of the nation's current "War on Drugs," which began in the early 1980s, an increasingly large percentage of those incarcerated have been charged with or convicted of nonviolent drug crimes.

Between 1980 and 1995, the number of state prisoners locked up for drug crimes increased by more than 1000%. Whereas only 1 out of every 16 state inmates was a drug offender in 1980, 1 out of every 4 in 1995 was a drug offender. By the middle of the 1990s, 60% of federal prison inmates had been convicted of a drug offense, as opposed to 25% in 1980. If local and county jail inmate populations are included in the calculation, there are now some 400,000 federal and state prison inmates — almost a quarter of the overall inmate population — serving time or awaiting trial for drug offenses.[59] Drug offenders accounted for more than 80% of the total growth in the federal inmate population — and 50% of the growth of the state prison population — from 1985 to 1995.[60]

An overly punitive crime control strategy is unwise and ineffective for many reasons, most beyond the scope of this chapter. But one of the chief failings of undue reliance on imprisonment to solve social problems is that this approach results in serious racial disparities. The "tough on crime" movement of the past several decades have led to incarceration rates for minorities far out of proportion to their percentage of the U.S. population.

C. Racially Disparate Sentencing Outcomes

One of the most thorough studies of sentencing disparities occurred in the New York courts between 1990 and 1992.[61] State researchers concluded that one-third of minorities sentenced to prison would have received a shorter or nonincarcerative sentence if they had been treated like similarly situated white defendants. If probation-eligible blacks had been treated like their white counterparts, more than 8,000 fewer black defendants would have received prison sentences in that period, resulting in a 5% decline in the percentage of blacks sentenced to prison.[62] Nationwide, black males convicted of drug felonies in state courts are sentenced to prison 52% of the time, while white males are sentenced to prison only 34% of the time.[63]

Racial disparities can be found not only in the fact of incarceration but in the length of prison or jail time served. According to a Justice Department review of state sentencing, whites who serve time for felony drug offenses serve shorter prison terms than their black counterparts: an average of 27 months for whites, and 46 months for blacks. These discrepancies are mirrored with regard to nondrug crimes. Whites serve a mean sentence of 79 months for violent felony offenses; blacks serve a mean sentence of 107 months for these offenses. Whites serve a mean sentence of 23 months for felony weapons offenses, blacks serve a mean sentence of 36 months for these offenses. Overall, whites in state prisons nationwide in 1994 served a mean time of 40 months, as compared to 58 months for blacks.[64]

D. Minority Incarceration Rates

The choice of legislatures to lengthen drug sentences, combined with drug enforcement tactics, has had a disproportionate impact on America's minorities.[65] As the overall prison population has increased because of the war on drugs, so too has the minority proportion of the overall prison (and drug offender) population. From 1970 to 1984, whites generally comprised approximately 60% of those admitted to state and federal facilities and blacks around 40%. By 1991, these ratios had reversed, with blacks comprising 54% of prison admissions versus 42% for whites.[66]

The changing face of the U.S. prison population is due in large measure to the war on drugs: In 1985, the number of whites imprisoned in the state system actually exceeded the number of blacks. Between 1985 and 1995, while the number of white drug offenders in state prisons increased by 300%, the number of similarly situated black drug offenders increased by 700%, such that there are more than 50% more black drug offenders in the state system than white drug offenders.[67]

Because the overall number of imprisoned drug offenders has increased, and the number of minorities as a percentage of that population has increased, far more minorities than whites are serving time for drug offenses as a percentage of their respective prison populations. As of 1991, 33% of all Hispanic state prison inmates, and 25% of all black state prison inmates, were serving time for drug crimes, as compared to only 12% of all white inmates.[68]

Minorities are disproportionately disadvantaged by current drug policies not because they commit more drug crimes, or use drugs at a higher rate, than white Americans. Rather, the disproportionate effect of the war on drugs on minorities results from three factors: First, more arrests of minorities for drug crimes; second, overall increases in the severity of drug sentences over the past 20 years; and third, harsher treatment of those minority arrestees as compared to white drug crime arrestees.

As noted, while blacks constitute approximately 12% of the population, as well as a similar percentage of U.S. drug users, they constitute 38% of all drug arrestees.[69] Given the demographics of the United States, therefore, far more blacks than whites per capita are arrested for drugs, and overall increases in arrests affect more blacks per capita than whites. Indeed, by 1989, with the war on drugs in full force and overall drug arrests having tripled since 1980,[70] blacks were being arrested for drug crimes at a rate of 1600 per 100,000, while whites were being arrested at one-fifth the frequency per capita — 300 per 100,000.[71] The statistics in certain U.S. cities were even more eye-catching: In Columbus, Ohio, black males accounted for 11% of the total population, and for 90% of the drug arrests.[72] In Jacksonville, Florida, black males comprised 12% of the population, but 87% of drug arrests.[73]

Why are minorities the primary targets of the war on drugs? Much of this discrepancy can be traced to practices such as racial profiling. The assumption that minorities are more likely to commit drug crimes and that most minorities commit such crimes will prompt a disproportionate number of investigations, and therefore arrests, of minorities. Drug arrests are easier to accomplish in impoverished inner-city neighborhoods than in stable middle-class neighborhoods, so the insistence of politicians on more arrests results in vastly more arrests of poor, inner-city blacks and Hispanics.[74]

Blacks are not only targeted for drug arrests. They are also 59% of those *convicted* of drug offenses and, because they are less likely to strike a favorable plea bargain with a prosecutor, 74% of those *sentenced to prison* for a drug offense. Thus, blacks are disproportionately subject to the drug sentencing regimes adopted by Congress and state legislatures. And these sentencing regimes, across all levels of government, increasingly provide for more and longer prison sentences for drug offenders.

Mandatory minimums such as "three strikes" laws result in the extended incarceration of nonviolent offenders, who, in many cases, are merely drug addicts or low-level functionaries in the drug trade. Indeed, in the first two years after enactment of California's "three strikes, you're out" law, more life sentences had been imposed under that law for marijuana users than for murderers, rapists, and kidnappers combined.[75] An Urban Institute study examining 150,000 drug offenders incarcerated in state prisons in 1991 determined that 127,000 of these individuals — 84% — had no history of violent criminal activity, and half of the individuals had no criminal record at all.[76]

IV. Willful Judicial Blindness

In this era of mandatory sentencing laws and sentencing guidelines, judges have less authority to affect the outcome of criminal cases through the exercise of judicial discretion. Still, courts bear significant responsibility for the injustices suffered by minorities in our criminal system. In the face of overwhelming racial disparities created by policing tactics, prosecutorial decision-making, and unjust sentencing laws, courts have generally declined to examine or redress racial inequality in the criminal justice system and have made it harder for litigants to expose such flaws.

The Supreme Court's consideration of capital punishment disparities in *McCleskey v. Kemp*[77] exemplifies the judiciary's unwillingness to look behind the exercise of discretion by other criminal justice decision-makers. McCleskey, sentenced to death in Georgia, presented statistical evidence from the Baldus Study, discussed earlier, that individuals charged with killing white victims were far more likely to be sentenced to death than individuals charged with killing black people. Had the victim in McCleskey's case been black instead of white, with all other factors remaining constant, there was a 59% chance he would have received a sentence other than death.[78]

By a 5 to 4 vote, the Court upheld McCleskey's death sentence. It found that while the statistical evidence cast doubt on the fairness of the Georgia death penalty in general, the evidence did not speak to whether capital punishment was unfairly applied to McCleskey himself. In order to justify overturning his death sentence, the Court held, McCleskey would need to demonstrate that his own sentence was tainted by racial considerations, which he could not do.

McCleskey "may be the single most important decision the Court has ever issued on the subject of race and crime"[79] because it signaled the Court's unwillingness to confront statistical evidence of racial unfairness in the criminal justice process. The requirement that a defendant demonstrate that racial bias infected his case specifically is almost always an impossible test. In setting the bar so high, the Court declared, in effect, that systemic racial bias does not offend the Constitution. The Court candidly expressed concern that overturning McCleskey's sentence on the grounds he presented would have opened the door to challenges based on other statistical disparities in the criminal justice system. But that concern is our concern — the criminal justice system is awash in racial disparities. As Justice William Brennan stated in dissent, the Court's decision "seem[ed] to suggest a fear of too much justice."[80]

The Court's reasoning in *McCleskey* has been adopted in other cases where law enforcement practices were challenged on grounds of racial disproportionality. The Georgia Supreme Court, for example, having invalidated the state's "two strikes, you're out" law because it was disproportionately applied to blacks, reversed itself two weeks later after receiving a brief signed by all 46 of the state's District Attorneys. The District Attorneys contended that the Court's initial decision could undermine Georgia's entire criminal justice system, an implicit admission that charging and sentencing outcomes in Georgia are racially skewed. The State Supreme Court's decision reversing itself relied almost exclusively on *McCleskey*.[81]

The Supreme Court raised the bar for challenging systemic racial bias even higher in *United States v. Armstrong*.[82] In *McCleskey* the Supreme Court had held that a defendant claiming unfair sentencing or selective prosecution based on race must demonstrate that his case was handled differently from similar cases involving defendants (or in the case of the death penalty, victims) of other races. Of course, much of the information bearing on this question will be in the hands of law enforcement officials themselves. In *Armstrong*, the Court put this information out of the reach of defendants.

Armstrong was prosecuted for a crack cocaine offense in Los Angeles. He sought to make an issue of the manifestly disparate treatment, discussed earlier, of white and black crack defendants in that jurisdiction. But the Court held that efforts to obtain records from the U.S. Attorney's office to prove selective enforcement could not proceed absent a threshold "colorable basis" for the charge of selective prosecution. Of course, the government's files were necessary to make that colorable showing, but the Court held that a defense attorney's affidavit alleging the absence of federal prosecutions of white crack offenders was simply "hearsay."[83] Under the Catch-22 reasoning of *McCleskey* and *Armstrong*, claims of selective prosecution and other claims alleging bias in law enforcement practices remain "available in theory, but unattainable in practice."[84]

Judicially created obstacles, based on a variety of legal doctrines, also prevent challenges to racially tinged police tactics. For example, in *City of Los Angeles v. Lyons*,[85] the Supreme Court declined to issue an injunction preventing the Los Angeles Police Department (LAPD) from using chokeholds during routine traffic stops. Lyons had been pulled over by the police because his car had a burned-out taillight. After the police officers ordered Lyons out of the car, spread his legs, subjected him to a patdown search, they applied a chokehold on him that permanently damaged his larynx and caused him to lose consciousness.

The Supreme Court held that Lyons lacked standing to obtain an injunction against the police procedure because he could not demonstrate that he would ever again be subjected to a chokehold by the LAPD under these circumstances. In so ruling, the court overlooked evidence that the LAPD had applied the chokehold on 975 occasions over 5 years, and that application of the chokehold had resulted in 16 deaths, 12 of which were of blacks.[86]

The Court's treatment of pretextual traffic stops further forecloses challenges to law enforcement practices that disproportionately burden blacks and Hispanics. In *Whren v. United States*,[87] the Court upheld a purely pretextual traffic stop, one based on no specific evidence of additional criminal activity. Indeed, the Court held that even if a reasonable officer would not have stopped the car in question, the mere existence of a traffic offense constituted probable cause for the stop. As one judge wrote in a dissent criticizing such reasoning: "Given the 'multitude of applicable traffic and equipment regulations' in any jurisdiction, upholding a stop on the basis of a regulation seldom enforced opens the door to . . . arbitrary exercises of police discretion."[88]

The judiciary's use of evidentiary thresholds and procedural barriers to foreclose challenges to racially based law enforcement has sustained a criminal process that provides, for too many Americans, "too little justice." The courts afford few remedies for anything but the most blatant (and generally outdated) forms of racial and ethnic discrimination.

V. Race and the Juvenile Justice System

The racial disparities that characterize criminal justice in America affect young people deeply, and cause minority youth to be overrepresented at every stage of the juvenile justice system. Juvenile justice deserves separate consideration in this chapter because it plays an especially destructive role in the lives of minority communities.

Juvenile justice was conceived as a way to intervene constructively in the lives of teenagers in order to steer them away from the adult criminal justice system. Juvenile courts were established throughout the United States in the early 1900s based on the recognition that children are different from adults; while children may violate the law, they remain uniquely suited to rehabilitation. It has long been recognized as counterproductive to label children as criminals, because the description becomes self-fulfilling. But for many black and Hispanic children, juvenile justice serves as a feeder system into adult courts and prisons.

Because the whole point of the juvenile justice system is to head off adult criminality, a pillar of that system is the segregation of children from adult prisoners. In the last decade, juvenile justice policy has increasingly blurred the distinctions between children and adults. Many states and the federal government have adopted laws that permit, encourage, or require youthful offenders to be tried as adults and ultimately transferred into adult prison populations. Minority youth suffer most from this policy shift because they already bear the brunt of racially skewed law enforcement.

For example, black teenagers are disproportionately targeted for arrest in the war on drugs. In Baltimore, Maryland, 18 white youths and 86 black youths were arrested for selling drugs in 1980. One decade later, juvenile drug sale arrests had increased more than 100% overall, and the almost 5-to-1 racial disparity that existed a decade earlier had become a 100-to-1 disparity: white youths were arrested 13 times for selling drugs in 1990 — *less* than in 1980 — while black youths were arrested 1304 times, a 1400% increase from 1980.[89]

These figures reflect the broader national experience: From 1986 to 1991, arrests of white juveniles for drug offenses decreased 34%, while arrests of minority juveniles increased 78%.[90] All this despite data suggesting that drug use rates among white, black, and Hispanic youths are about the same, and that drug use has in fact been lower among black youths than white youths for many years."[91] Similar disparities appear in relation to non-drug-related crimes.[92]

Overrepresentation of minority youths in the juvenile justice system increases after arrest. As a general matter, minority youths tend to be held at intake, be detained prior to adjudication, have petitions filed, be adjudicated delinquent, and be held in secure confinement facilities more frequently than their white counterparts."[93] For example, in 1995, 15% of cases nationwide involving white juveniles resulted in detention, while 27% of cases involving black juveniles resulted in detention, even though whites comprised 52%, and blacks only 45% of the entire juvenile caseload."[94]

The experiences of individual states are equally dismaying. Disproportionate confinement of young Hispanics has been documented in each of the four states with the largest Hispanic youth populations — Arizona, Texas, New Mexico, and California. In Ohio in 1996, minorities represented 43% of the juveniles held in secure facilities, despite representing only 14.3% of the overall state juvenile population.[95] Similarly, in Texas in 1996, minority youths represented 80% of those juveniles held in secure facilities, while representing only 50% of the overall state juvenile population. A 1990 Florida study determined that "when juvenile offenders were alike in terms of age, gender, seriousness of the offense which promoted the current referral, and seriousness of their prior records, the probability of receiving the harshest disposition available at each of several processing stages was higher for minority youth than for white youth."[96]

Black, Hispanic, and Asian American youths are far more likely to be transferred to adult courts, convicted in those courts, and incarcerated in youth or adult prison facilities than white youths. A study of Los Angeles County juvenile justice trends carried out by the Justice Policy Institute (JPI) is revealing. Under California law, an under-18 youth may be prosecuted in either juvenile court or adult court, may either be sentenced to a prison term in a California Youth Authority (CYA) facility and then perhaps transferred to an adult facility at age 18, or given probation. The JPI study concluded that while minority youths are five times more likely than white youths to be transferred to a CYA facility by a juvenile court (a disturbing disparity in and of itself), they are ten times more likely to be placed in CYA facilities by an adult criminal court. The study found that although minority youths comprised 75% of California's juvenile justice population, they comprised almost 95% of all cases found "unfit" for juvenile court and transferred to adult court.[97]

Several national trends parallel the California experience: "tough-on-crime" juvenile justice policies are in vogue, and minority youths are the primary targets of these policies.

First, the overall under-18 population in state prisons is increasing. In 1985, 3,400 youths were admitted to state prisons; by 1997, the number was 7,400, more than double the prior total. This increase was more pronounced than the increase in arrests during that time. For every 1,000 arrests for violent crimes by under-18s, 33 youths were incarcerated in 1997, as compared to 18 in 1985.[98]

Second, the number of cases transferred from juvenile courts to adult courts has increased 70% in a decade, from 7,200 in 1985 to 12,300 in 1994.[99] The prison terms served by these youths have also increased, from a mean minimum term in 1985 of 35 months to a mean minimum term in 1997 of 44 months.[100] Contrary to contentions that this development reflects a surge of violent criminal activity by America's youth, approximately two-thirds of the youths prosecuted in adult court in 1996 were charged with nonviolent offenses.[101] Yet overall, in 1998, nearly 18,000 youths spent time in adult prisons, and approximately 20% of these youths were mixed in with the adult population.[102]

Third, minority youths make up the majority of those youths in the state prison system. In 1997, Hispanic and black youths made up 73% of the overall under-18 state prison population, a 10% increase from 1985 figures.[103]

Fourth, the disparity between the numbers of minority and white youths in state prisons is increasing, especially for drug offenses. In 1985, the number of black youths held in state prisons for drug offenses was 1.5 times greater than the number of white youths imprisoned for the same offenses. By 1997, the number of black juvenile drug offenders in state prisons was over 5.3 times greater than the number of imprisoned white juvenile drug offenders.[104]

Finally, minority youths are involved in an increasing number of the cases transferred from juvenile to adult court: the number of cases involving white youths that were transferred from juvenile to adult courts increased approximately 50% between 1985 and 1994; transferred cases involving black youth increased almost 100% and are now approximately half of all transferred cases, despite the much smaller percentage of black youth in the overall juvenile population.[105] And cases involving black juveniles were almost twice as likely to be transferred to adult criminal court as cases involving white juveniles, principally because of the relatively large number of transferred (nonviolent) drug cases involving black juveniles.[106]

Federal policy toward juveniles already disproportionately impacts some minority groups. Because crimes committed on Indian reservations often fall within federal jurisdiction, Native American youths who engage in minor criminal conduct that ordinarily would be prosecuted in state court instead face federal prosecution and federal penalties that, as described, are often far harsher than those imposed in state court. For this reason, approximately 60% of youths in federal custody are Native American.[107] Disabled children are also disadvantaged in the juvenile justice system because they may lose their statutory entitlement to individualized education programs upon being transferred to adult facilities.

The fear of crime by minority youths will lead to policies that breed crime by minority youths, and that will justify even more aggressive efforts to bring minorities under criminal justice control. Meanwhile, efforts to examine the race-based disparities that pervade juvenile justice in America languish.

VI. The Consequences of too Little Justice

Concerns about racial disparity in criminal justice are not new.[108] But the crisis has grown dramatically worse in the years since the problem was first identified.

Today it is beyond debate that America's minorities are treated unfairly within the criminal justice system. Innocent minorities are detained and interrogated more often than innocent whites. Minorities who violate the law are more likely to be targeted for arrest, less likely to be offered leniency, and are subject to harsher punishment when compared to similarly situated white offenders. Each successive measure of unequal treatment compounds the prior disparities. Meanwhile minority youths face similar inequities, and are therefore more likely than white youths to be transformed by government policies into career criminals.

There is a cyclical quality to the treatment of black and Hispanic Americans in the criminal justice system. Much of the unfairness visited upon these groups stems from the perceptions of criminal justice decision-makers that (1) most crimes are committed by minorities, and (2) most minorities commit crimes. Although empirically false, these perceptions cause a disproportionate share of law enforcement attention to be directed at minorities, which in turn leads to more arrests of blacks and Hispanics. Disproportionate arrests fuel prosecutorial and judicial decisions that disproportionately affect minorities and result in disproportionate incarceration rates for minorities. The accumulated effect is to create a prison population in which blacks and Hispanics increasingly predominate, which in turn lends credence to the misperceptions that justify racial profiling and "tough-on-crime" policies.

There are innumerable consequences to this vicious cycle of inequality — for incarcerated minorities, for their families and communities, and for the continued legitimacy of the criminal justice system.

A. The Lost Generation and Their Families

Two million people are housed in American prisons. Although they comprise less than a quarter of the U.S. population, black and Hispanic Americans make up approximately two-thirds of the total U.S. prison population. The percentage of prisoners who are black is four times that of the percentage of blacks in the U.S. population (49% to 12%); the percentage of prisoners who are Hispanic is almost twice that of the percentage of Hispanics in the U.S. population (17% to 10%).[109] In order to grasp the enormity of these facts, consider that:

- Almost one in three black males aged 20-29 is on any given day under some form of criminal supervision — either in prison or jail, or on probation or parole.[110]
- As of 1995, 1 in 14 adult black males was in prison or jail on any given day.[111]

- A black male born in 1991 has a one-in-three chance of spending time in prison at some point in his life. A Hispanic male born in 1991 has a one-in-six chance of spending time in prison.[112]

- For every 1 black male who graduates from college, 100 black males are arrested.[113]

Black and Hispanic America have lost a generation of young men to the criminal justice system. Statistical projections suggest that future generations of minority males will be lost unless our criminal justice policies are reformed.

The rate at which young minorities are relegated to lives of incarceration and its consequences serves to negate many of the hard-fought gains of the civil rights movement. During the last half of the 20th century, black Americans and other minorities struggled to win the right to equal opportunity in employment, housing, education, and public accommodations. These rights are meaningless to hundreds of thousand of minority prisoners and are largely unavailable to hundreds of thousands of minority ex-convicts. The ability of minorities to enjoy the fruits of the civil rights struggle is compromised by the racial disparities of the criminal justice system.

Perhaps the most precious of the civil rights victories was the right to vote. In a democracy such as ours, the franchise is the fundamental engine of change. Yet in 46 states and the District of Columbia, convicted adults in prison are stripped of the right to vote. Thirty-two states also disenfranchise felons on parole, while 29 states disenfranchise felons on probation. And 14 states even disenfranchise for life ex-felons who have fully served their prison terms.[114] Many of those who lose the right to vote are convicted of relatively minor, nonviolent crimes. In some states, an offender who receives probation for a single sale of marijuana, or for shoplifting, may be permanently disenfranchised.

Because of the disproportionately high percentage of convicted black criminals, these laws have a disproportionate effect on blacks, reneging on the guarantees of the 14th Amendment and the Voting Rights Act. As a consequence of disenfranchisement laws, 1.4 million black men — 13% of the entire adult black male population — are denied the right to vote. In two states, 31% of all black men are permanently disenfranchised. In five states, approximately one in four men are currently disenfranchised. And given current rates of incarceration, in states with the most restrictive voting laws, 40% of black men are likely to be permanently disenfranchised in upcoming years.[115] Disenfranchisement laws furnish another example of the disproportionate and lingering effects of criminal justice policies on minorities.[116]

The massive incarceration of black and Hispanic males also has a destabilizing effect on their communities. It skews the male-female ratio in those communities, increases the likelihood that children will not be raised by both parents, and contributes to the fragmentation of inner-city neighborhoods that renders the crime-race linkage a self-fulfilling prophecy. In many communities involvement in the criminal justice system is so common that the criminal law has lost its stigmatizing effect. Jail can become a badge of honor through overuse of criminal sanctions.[117]

These ripple effects of imprisonment on family and community are especially acute when the prisoner is a woman. Black women are incarcerated at a rate seven times greater than that of white women. The 417% increase in their incarceration rates between 1980 and 1995 is greater even than the increase for black men. Three-fourths of the women in prison in 1991 were mothers, and two-thirds had children under 18.[118] More women in prison therefore means fewer mothers caring for their children, a trend that further exacerbates the deterioration of minority communities and family structures.

B. Effects on the Justice System Itself

The effects of racial disparities in the justice system extend beyond prisoners and prisoners' families. That inequality ultimately affects all Americans because it compromises the legitimacy of the system as a whole, undermines its effectiveness, and fosters racial division.

Persistent inequality in the justice system gives minorities good reason to distrust the system and to refuse to cooperate with it. Such lack of cooperation can take many forms, each of which has a corrosive effect on the system's strength and continued viability.

To be effective, police and prosecutors need the cooperation of those who are victimized by criminal conduct. Minorities are disproportionately victimized by crime. Black Americans are victimized by robbery at a rate 150% higher than that for whites. They are the victims of rape, aggravated assault, and armed robbery at a rate 25% greater than that for whites. And homicide is the leading cause of death among young black males.[119] It is in the interest of minority communities to support the fight against crime. Yet the perception that the criminal justice system is not on their side leads many black and Hispanic Americans — as well as other groups with historically tense relationships with the police, such as gays — to underreport criminal activity. This is true as much for *witnesses* of crime as it is for victims of crime. Minorities are often reluctant to assist in a criminal investigation because they view law enforcement authorities as hostile or indifferent to their concerns.

The perception of racial injustice manifests itself in important ways when minorities are asked to serve as jurors. First, many minorities, when summoned for jury duty, simply do not appear. In Chicago, 60% of residents of black neighborhoods did not even respond to calls for jury duty, as compared to 8% of residents in white neighborhoods.[120] Given the constitutional guarantees of trial by a jury of a defendant's peers, the failure of minorities to appear for jury duty has enormous implications for minority *defendants* and for the legitimacy of the jury system.

Those minorities who do appear for jury duty may have such strong preconceptions about the justice system that they simply will not accept the testimony of police witnesses or the arguments of prosecutors. In some jurisdictions it is difficult to obtain a conviction predicated on uncorroborated police testimony. And even if jurors believe the prosecution's case, they may engage in the practice of jury nullification. Deputy Attorney General Holder recalls that when he served as a Washington, D.C., trial judge, it was not uncommon for drug possession prosecutions to result in hung juries because a single juror decided that "I just was not going to vote to send another young black man to prison" (Holder's words).[121] Jury nullification, which is also gaining legitimacy in civil rights scholarship,[122] is a troubling development for law enforcement officials.

C. Health and Economic Effects

The health consequences of rising incarceration rates are often overlooked. As a result of prison overcrowding and the lack of appropriate correctional health care, tuberculosis spread rapidly in the early 1990s. In New York City, where a particularly virulent, multi-drug-resistant form of the disease broke out, 80% of known cases were traced to prisons.[123] Moreover, the rate of HIV infection in the prison population is now 13 times that of the nonprison population.[124] Given the number of individuals incarcerated, and the constant interchanges between the prison and outside population, these developments signal a public health crisis that has dire consequences for prisoners and nonprisoners alike. And because minorities are disproportionately represented among prisoners, these public health effects are felt most sharply in minority communities.

Overuse of incarceration also has significant economic consequences. Rapid increases in incarceration rates require increased construction of facilities in which to house prisoners. More than half of the prisons in use today in the United States were built in the last 20 years. The Bureau of Prisons is the largest arm of the Justice Department.[125] The 1994 crime bill alone included $8 billion in funding for new state prison construction. Funding for prison construction not only edges out funding for alternative crime-fighting strategies, such as prevention and treatment programs, it also edges out funding for many other priorities, within and outside the justice system. More money for prisons means less money for schools, libraries, youth athletic programs, literacy programs, and many other programs that might do more to reduce crime than lengthy incarceration.

Minority communities, which are often beneficiaries of social spending, therefore feel the sting of criminal justice twice. They are victimized by racially skewed enforcement strategies and then deprived of needed funding for schools and community development. Once again the system is self-perpetuating, because the paucity of quality education and jobs can bear directly on rates of criminality in minority communities.

D. Loss of National Ideals

The final — and perhaps most important — consequence of a racially divided criminal justice system is the hardest to quantify. Our national self-image, against which we judge both ourselves and other nations around the world, is of a land in which all people are created equal and each is entitled to fair treatment before the law. We have often failed to live up to this goal, but have never given up the struggle to attain it. The inequities detailed in this chapter demonstrate that we have fallen short.

VII. Recommendations

There are several reasons why racial inequality in the criminal justice system cannot be eradicated easily.

First, there actually is no single American criminal justice system. The federal government, each state, and many localities operate independent court systems, and there are thousands of discrete law enforcement agencies throughout the United States. Unlike some other civil rights battles, criminal justice reform is a state-by-state challenge.

Second, little or no *de jure* racial discrimination remains in the criminal law (although the different federal sentencing schemes for crack and powder cocaine come close). Instead, racial disparities emerge from deeply rooted, self-fulfilling stereotypes and assumptions. A complex network of laws, policies, priorities, and practices perpetuate the racially skewed outcomes described in this chapter. It is difficult enough to get to the source of the problem, much less change it.

Third, efforts to reform criminal justice policies are politically perilous — no office holder wants to be labeled "soft on crime" — and measures to make crime policy more rational and equitable are uniquely susceptible to such demagoguery. Crime rates have declined in recent years, a phenomenon that has more to do with demographics and the strength of the economy than the racially tainted policing strategies and sentencing initiatives of recent years.[126] But mayors, police chiefs, legislators — even Presidents — love to take credit for safer streets and are loath to tinker with a winning electoral formula.

Still, efforts to redress racial biases in criminal justice are beginning to take root, and a growing number of courageous politicians are willing to challenge criminal justice orthodoxy. The recommendations set forth below build on these encouraging trends.

A. Build Accountability into the Exercise of Discretion by Police and Prosecutors

Just as racial disparity begins with discretionary decisions by front-line law enforcement personnel, so should remedies begin there.

We do not advocate that discretion be eliminated from the criminal justice system. That goal would be unattainable and unwise. Criminal laws are written in broad terms, and experienced law enforcement officials, both police and prosecutors, must retain the authority to apply the laws in individual cases with wisdom and common sense. A criminal justice system that did not delegate some discretion to those who enforce the laws would yield even harsher, less rational results than the current system. As our unfortunate experience with mandatory sentencing proves, discretion is a key ingredient of justice.

The problem with discretion in today's criminal justice system is that it is exercised without meaningful accountability. While law enforcement discretion must be preserved, the type of unchecked, unreviewable discretion that police and prosecutors currently wield breeds racial disparity and resentment.

The credibility gap between minority Americans and front-line law enforcement is yawning, and it widens with every new report on racial profiling and every new account of police brutality. Closing this gap requires the following mechanisms to improve police accountability:

- The development of national standards for accrediting law enforcement agencies. No such national standard currently exists, leading to a patchwork of law enforcement guidelines throughout the nation. The national standards should include specific guidance on traffic stop procedures; the use of force; and interaction between police officers and multicultural communities. *The standards should expressly prohibit racial profiling of any kind.*

- Improved training of current and incoming police officers to bring police departments into compliance with the national standards.

- The passage of federal legislation requiring federal and state law enforcement officials to gather data on traffic stops and other encounters associated with racial profiling, such as INS enforcement activities and airport/drug courier inquiries. Such data should be disseminated publicly.

- Expanded authority and resources for police oversight agencies such as the Civil Rights Division of the Justice Department to investigate and punish misconduct, including racial profiling, brutality, and corruption.

The improper exercise of prosecutorial discretion, like law enforcement discretion, has a disproportionate impact on minorities and should also be subjected to greater public scrutiny. We recommend passage of federal legislation requiring the collection and publication of data by each U.S. Attorney's office and each state prosecutor's office regarding the charging and sentencing practices and outcomes in those offices and the racial impact of those outcomes.[127]

B. Improve the Diversity of Law Enforcement Personnel

Much of the hostility between minority communities and the police can be traced to the underrepresentation of minorities in law enforcement. In too many neighborhoods, the police are seen as an occupying force rather than a community resource. Police departments and prosecutors' offices should redouble their efforts to recruit minorities. Police departments should encourage, and perhaps require, that officers live in the cities they patrol.

Diversification requires adequate funding and well-targeted recruitment efforts. We recommend that the federal government condition grant programs to state and local law enforcement agencies on efforts by those agencies to implement minority recruitment and hiring practices.

C. Improve the Collection of Criminal Justice Data Relevant to Racial Disparities

As in other areas of American life, we need to be more conscious of racial issues in criminal justice in order to achieve a color-blind criminal justice system eventually. The collection of racial data is essential to identify flaws in current policies and devise the means to redress them.

Many of the data sets generated by government agencies and private researchers concerning race and criminal justice take account of the experiences of African Americans and whites but do not include statistics on Hispanics, Asian Americans or Native Americans. We recommend that all major minority groups be included in future data collection efforts, at least where such empirical evidence would be statistically significant.

D. Suspend Operation of the Death Penalty

As capital punishment is currently implemented, the decision of who will live and who will die depends, in significant measure, on the race of the defendant and the race of the victim. This is due both to flawed procedures such as the appointment of incompetent lawyers for indigent defendants as well as to racial attitudes and stereotypes that cannot be easily overcome.

Even those who do not believe that death penalty statutes should be repealed altogether should agree on the need for a nationwide moratorium on application of the death penalty while flaws in death penalty procedures are studied and remedies are proposed. During this period there should be a comprehensive review of the effects of race on capital sentencing outcomes.

E. Repeal Mandatory Minimum Sentencing Laws

Although sometimes conceived as a means to combat unwarranted racial disparity in sentencing, mandatory minimum sentencing laws are, in fact, engines of racial injustice. They have filled America's prisons to the rafters with thousands of nonviolent minority offenders. They deprive judges of the ability to consider mitigating circumstances about the offense or the offender, an exercise of judicial discretion that can help redress racial bias at earlier stages of the criminal justice system. Particularly egregious are "three strikes" or "two strikes" mandatory sentencing laws that impose long and irreducible prison terms for even the most minor criminal conduct. These demagogic policies have resulted in a mushrooming prison population and in the disproportionate incarceration of minorities.

The repeal of mandatory minimum sentencing laws would be a significant step toward restoring balance and racial fairness to a criminal justice system that has increasingly come to view incarceration as an end in itself.

F. Reform Sentencing Guideline Systems

Were mandatory minimum sentencing laws to be repealed, sentencing in the federal system and many state systems would be carried out pursuant to sentencing guidelines. The problem is that the guideline systems are often based on and therefore infected by the racial disparities in current sentencing statutes.

For example, the disparate treatment of crack and powder cocaine offenders in the federal system has been carried over from the Controlled Substance Act to the sentencing guidelines manual. The 100-to-1 ratio between the amount of powder cocaine and the amount of crack cocaine needed to trigger the statutory mandatory penalty is found in the drug equivalency table in the guidelines as well. So even after the statute is changed, it will be necessary to revisit and redress unfairness in the guidelines.

G. Reject or Repeal Efforts to Transfer Juveniles into the Adult Justice System

Perhaps no criminal justice policy is more destructive to our nation than one that extends incarceration and punishment-based crime approaches to children. Laws that shun rehabilitation of youthful offenders in favor of their transfer into the adult criminal justice system are inconsistent with a century of U.S. juvenile justice policy and practice, are applied disproportionately to minority youth, and threaten to create a permanent underclass of undereducated, untrained, hardened criminals. Laws that encourage treating nonviolent juvenile offenders as adults should be repealed.

H. Improve the Quality of Indigent Defense Counsel in Criminal Cases

Many of the racially disparate outcomes in the criminal justice system are attributable to inadequate lawyering. To be sure, there are some obstacles that even the finest lawyer cannot overcome, such as the combination of a mandatory sentencing law and an obstinate prosecutor. But other inequities can be exposed and perhaps reversed through aggressive advocacy by defense counsel.

Unfortunately, many minority defendants depend on indigent defense services provided by the state. The lawyers who perform this role are often very dedicated and hardworking, but undercompensated and overwhelmed with a caseload that precludes vigorous advocacy on behalf of individual defendants. The problem here is a system that inadequately funds this vitally important component of the criminal process.

There should be a systematic review of indigent defense services in the United States in order to inject new resources and effect significant improvements.

I. Repeal Felony Disenfranchisement Laws and Other Mandatory Collateral Consequences of Criminal Convictions

Disenfranchisement laws are antithetical to democracy and disproportionately affect minorities, eroding the important gains of the civil rights era. They also violate international law — specifically, Article 25 of the International Covenant on Civil and Political Rights.[128] These laws should be abolished, and other collateral consequences of criminal convictions such as eviction from public housing and restrictions on student loans should be reviewed and, in any event, not mandatorily imposed. Criminal sentences, including collateral consequences such as disenfranchisement, should be tailored to the nature of the crime and the circumstances of the offender and should impose no more punishment than is necessary to achieve public safety, deterrence, and rehabilitation.

J. Restore Balance to the National Drug Control Strategy

As noted above, the massive increases in incarceration, including minority incarceration rates, are largely attributable to the war on drugs. Even if each of the criminal justice recommendations already proposed were adopted, we would be left with a national drug control strategy that seeks to combat drug abuse by locking up addicts. As we have seen, that policy has inevitable and disastrous consequences for minority communities.

Thirty years ago, during the Nixon Administration, there was recognition that drug abuse was a medical problem as well as a criminal justice challenge.[129] Even at the height of the crack cocaine epidemic during the first Bush Administration, there was lip service paid to the concept of a balanced drug strategy, one that dedicated substantial resources to treatment, prevention, education and research as a necessary complement to interdiction and law enforcement. But today, demand reduction efforts are on the back burner.

The United States needs a more balanced drug strategy, one that adequately supports treatment, prevention, education, research, and other efforts to reduce the demand for drugs. The current strategy places far too much reliance on the criminal justice system to solve a problem that is at least in part a public health problem. The result has been an experiment in mass incarceration that has devastated minority communities without discernable benefit.

VIII. Conclusion

Racial disparities in the criminal justice system are one manifestation of broader racial divisions in America. Many of the perceptions and prejudices that give rise to inequities in criminal justice are the same prejudices that have been with us since the founding of the Republic. Not until those underlying prejudices are shattered will true equality for all Americans, in all facets of life, have been achieved.

The criminal justice arena is an especially critical battleground in the continued struggle for civil rights. Current disparities in criminal justice threaten 50 years of progress toward equality. Criminal justice reform is a civil rights challenge that can no longer be ignored.

Endnotes

[1] For extensive discussion of the "driving while black" phenomenon, *see* Angela J. Davis, "Race, Cops, and Traffic Stops," 51 *University of Miami Law Review* 425 (1997); David A. Harris, "'Driving While Black' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops," 87 *Journal of Criminal Law and Criminology* 544 (1997); David Harris, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters," 84 *Minnesota Law Review* 265 (1999) ("Why 'Driving While Black' Matters").

[2] David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, at 36 and n. 66 (The New Press 1999) ("*No Equal Justice*"). *See also* "Why 'Driving While Black' Matters" at 280-81 and nn. 82-92.

[3] *No Equal Justice* at 36-37, nn. 69-70. *See also* Marc Mauer, *Race to Incarcerate*, at 129 and n. 13 (New York, The New Press 1999) ("*Race to Incarcerate*").

[4] *No Equal Justice* at 38.

[5] *No Equal Justice* at 25 and n. 29.

[6] Gary Webb, "DWB; Police Stops Motorists To Check for Drugs," *Esquire*, at 126 (Apr. 1, 1999).

[7] National Council of La Raza, *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the 90's*, at 26 (1999) ("*The Mainstreaming of Hate*").

[8] *Id.* at 19.

[9] *No Equal Justice* at 44-45.

[10] Angela J. Davis, "Prosecution and Race: The Power and Privilege of Discretion," 67 *Fordham Law Review* 13, 27 (1998) ("Prosecution and Race").

[11] Why 'Driving While Black' Matters at 297.

[12] There is evidence that violent crime rates are higher in black neighborhoods, for reasons involving the correlation between violence and poverty, and the reality that blacks in the United States are disproportionately poor. *See generally Race to Incarcerate* at 163-170. In any event, racial profiling and drug courier profiles are employed to uncover nonviolent drug crimes, not assaults, and therefore derive no legitimacy from violent crime rate statistics.

[13] Substance Abuse and Mental Health Services National Administration, U.S. Department of Health and Human Services, "National Household Survey on Drug Abuse, Preliminary Results from 1997," at 13, 58, Table 1A (1999). While involvement in drug trafficking is harder to measure, a National Institute of Justice Report indicates that drug users tend to purchase from members of their own racial or ethnic background. K. Jack Riley, National Institute of Justice, U.S.

Department of Justice, "Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities," at 1 (Dec. 1997).

[14] Why 'Driving While Black' Matters at 296 (*citing* National Institute on Drug Abuse, "Drug Use Among Racial/Ethnic Minorities," at 64-66 (1997); Bureau of Justice Statistics, U.S. Department of Justice, "Drugs, Crime, and the Justice System," at 28 (1992)).

[15] *Id.* at 295-296 (*citing* U.S. Customs Service, "Personal Searches of Air Passengers Results: Positive and Negative, Fiscal Year 1998," at 1 (1998) (finding that 6.7% of whites, 6.3% of blacks, and 2.8% of Hispanics carried contraband)).

[16] U.S. General Accounting Office, *U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results*, at 2 (Mar. 2000).

[17] Why 'Driving While Black' Matters at 297.

[18] Bureau of Justice Statistics, U.S. Department of Justice. *Sourcebook of Criminal Justice Statistics 1997*, at 338 (table 4.10), 422 (table 5.46).

[19] Why 'Driving While Black' Matters at 303. *See also* Prosecution and Race at 36 (noting that "[r]ace . . . may affect the existence of a prior criminal record even in the absence of recidivist tendencies on the part of the suspect").

[20] *See* William K. Rashbaum, "Undercover Police in Manhattan Kill an Unarmed Man in a Scuffle," *The New York Times*, Mar. 17, 2000, at A1; Eric Lipton, "Giuliani Cites Criminal Past of Slain Man," *The New York Times*, Mar. 20, 2000, at B1.

[21] *The Mainstreaming of Hate* at 20.

[22] Adam Cohen, "Gangsta Cops," *Time*, at 32 (Mar. 6, 2000).

[23] *The Mainstreaming of Hate* at 15 and n.41. *See also* Julia Vitullo-Martin, "Fairness Not Simply A Matter of Black and White," *The Chicago Tribune*, Nov. 13, 1999 (citing recent poll by the Joint Center for Political and Economic Studies indicating that 56% of whites agree that police are far more likely to harass and discriminate against blacks than against whites).

[24] Indeed, many instances of police brutality against minorities begin with a race-based misperception that an individual is a criminal suspect. In 1988, for instance, Hall of Fame baseball player Joe Morgan was approached by a police officer at an airport. The officer's sole basis for approaching Morgan was that another black man who was a suspected drug dealer had stated that he was traveling with someone who "looked like himself" — i.e., black. When Morgan objected to the officer's accusation, the officer threw Morgan to the ground, handcuffed him, put his hand over Morgan's mouth and nose. Of course Morgan was eventually cleared of any wrongdoing. *No Equal Justice* at 24-25. Hispanics can point to similar experiences. *See The Mainstreaming of Hate* at 17.

[25] Bennett L. Gershman, "The New Prosecutors," 53 *University of Pittsburgh Law Review* 393, 448 (1992) ("The American prosecutor, owing to a variety of social and political factors, has emerged as the most pervasive and dominant force in criminal justice."). *See also* Prosecution and Race at 20-25.

[26] Prosecution and Race at 21-22 and nn. 28-33.

[27] Christopher Schmitt, "Plea Bargaining Favors Whites, as Blacks, Hispanics Pay Price," *The San Jose Mercury News*, Dec. 8, 1991, at 1A ("*Mercury News* Report").

[28] U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy*, at 138 and nn. 186-188 (Feb.1995) ("*Cocaine and Federal Sentencing Policy*").

[29] Dan Weikel, "War on Crack Targets Minorities over Whites," *The Los Angeles Times*, May 21, 1995, at A1 ("Weikel").

[30] *Id.*

[31] *Id. See also Cocaine and Federal Sentencing Policies* at xi (Blacks and Hispanics accounted for 95.4% of crack cocaine distribution offenses in 1993).

[32] *Id.*

[33] Weikel at A1. Data analyzed by the U.S. Sentencing Commission reveals that nationwide, more than 94.5% of federal crack defendants in 1992 were either low- or middle-volume dealers or couriers, and only 5.5% were high-volume dealers. *Cocaine and Federal Sentencing Policy* at 172.

[34] *Cocaine and Federal Sentencing Policy* at 192 ("[S]entences appear to be harsher and more severe for racial minorities than others as a result of this law, and hence the perception of unfairness, inconsistency, and a lack of evenhandedness").

[35] Public Law No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

[36] *Cocaine and Federal Sentencing Policy* at 8.

[37] Most criminal cases end in a plea bargain. *See* Rebecca Hollander-Blumoff, "Getting to 'Guilty': Plea Bargaining as Negotiation," 2 *Harvard Negotiation Law Review* 115, 117 n. 7 (1997) (discussing studies showing that as much as 90% of all criminal cases end in plea bargains).

[38] *See* Prosecution and Race at 23-25 and nn. 41-59 (discussing importance of, and prosecutorial discretion inherent in, charging decisions and plea bargaining).

[39] *Mercury News* Report at 1A.

[40] *No Equal Justice* at 143. The Georgia Supreme Court initially held that these statistics presented a prima facie case of discrimination, and invalidated the "two strikes, you're out" statute. *Stephens v. State*, 1995 WL 116292 (Georgia 1995). The court, however, reversed itself less than two weeks later upon being presented with a petition signed by all of Georgia's 46 district attorneys claiming that the court's approach, because it would apply to so many other areas of prosecution, such as the death penalty, would "paralyze the criminal justice system" in Georgia. *No Equal Justice* at 143 (*citing Stephens v. State*, 456 S.E.2d 560 (Georgia 1995)).

[41] *Race to Incarcerate* at 139. The Justice Department contends that these disparities were due to legally relevant case-processing factors. *Id.* (*citing* Dale Parent *et al.*, National Institute of Justice, *Mandatory Sentencing*, at 4 (Jan. 1997)).

[42] Office of Justice Systems Analysis, New York State Division of Criminal Justice Services, "Disparities in Processing Felony Arrests in New York State, 1990-1992," at v-vi, xi (Sept. 1995) ("New York Felony Study").

[43] Ian Ayres and Joel Waldfogel, "A Market Test for Race Discrimination in Bail Setting," 46 *Stanford Law Review* 987 (1994).

[44] Bureau of Justice Statistics, U.S. Department of Justice, *Compendium of Federal Justice Statistics*, at 25 (Jan. 1999).

[45] *See generally* Bail Reform Hearings, 1982: Hearings on S. 1554 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 97th Congress, 1st Session (1982) (statement of Professor Daniel Freed).

[46] Prosecution and Race at 24 and nn. 49-51.

[47] U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, at 5 (1990) ("GAO Study") (noting that '[t]his finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques.").

[48] David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," 74 *Journal of Criminal Law and Criminology* 661-753 (1983) ("Baldus Study").

[49] *McCleskey v. Kemp*, 481 U.S.C. § 279, 321 (1987) (Brennan, J., dissenting) (*citing* Baldus study).

[50] The Baldus study concluded that black defendants were only 1.1 times more likely to receive the death penalty than white defendants. *See also* GAO Study at 6 ("The evidence for the influence of the race of defendant on death penalty outcomes was equivocal").

[51] *McCleskey v. Kemp*, 481 U.S.C. § 327 (Brennan, J., dissenting) (*citing* Baldus study).

[52] Staff Report by the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, "Racial Disparities in Federal Death Penalty Prosecutions 1988-1994," 103rd Congress, 2d Session, at 2 (Mar. 1994). As the Staff Report noted, "[a]lthough the number of homicide cases in the pool that the U.S. Attorneys are choosing from is not known . . . the almost exclusive selection of minority defendants for the death penalty, and the sharp contrast between capital and non-capital prosecutions under [21 U.S.C. § 848] indicate a degree of racial bias in the imposition of the federal death penalty that exceeds even pre-*Furman* levels." *Id.*

[53] *See* Prosecution and Race at 34.

[54] *Saldano v. Texas*, No. 72-556 (Texas Ct. Cr. App. Sept. 15, 1999), at 9.

[55] *Saldano v. Texas*, No. 98-8119 (June 5, 2000).

[56] 18 U.S.C. § 3553(e). Similarly, the federal sentencing guidelines require a prosecutor to certify substantial assistance before the court may depart below the applicable guideline range. United States Sentencing Guidelines, Section 5K1.1.

[57] *See generally* Kate Stith and Steve Y. Koh, "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," 28 *Wake Forest Law Review* 223 (1993).

[58] *Race to Incarcerate* at 19-20.

[59] Marc Mauer, "The Crisis of the African-American Male and the Criminal Justice System," Written Testimony Before the U.S. Commission on Civil Rights, at 8 (Apr. 15-16, 1999) ("Mauer Civil Rights Commission Testimony") (citing data from the Bureau of Justice Statistics, U.S. Department of Justice).

[60] Christopher J. Mumola and Allen J. Beck, Bureau of Justice Statistics, U.S. Department of Justice, "Prisoners in 1996," at 11 (June 1997) ("Mumola and Beck"); *Race to Incarcerate* at 32.

[61] *See* Chapter II, n. 58 (*citing* New York Felony Study).

[62] New York Felony Study at 43.

[63] Jodi M. Brown and Patrick A. Langan, Bureau of Justice Statistics, U.S. Department of Justice, "State Court Sentencing of Convicted Felons, 1994," at 24, table 2.10 (Mar. 1998) ("Brown and Langan").

[64] Brown and Langan at 21, table 2.7.

[65] Anti-drug efforts in America have always had a racial tint. During periods of intense intolerance, "drug use becomes associated . . . with the lower ranks of society, and often with ethnic and racial groups that are feared or despised by the middle class." Daniel Kagan, "How America Lost Its First Drug War," *Insight*, at 8 (Nov. 20, 1989). "Earlier in this century, although mainstream women were the model category of opiate users, images of Chinese opium smokers and opium dens were invoked by opponents of drug use." Michael Tonry, "Race and the War on Drugs," 1994 *University of Chicago Legal Forum* 25, 39 (1994). And "imagery linking Mexicans to marihuana use was prominent in the anti-marihuana movements that culminated in the Marihuana Tax Act of 1937." *Id. See generally* David Musto, *The American Disease: Origins of Narcotic Control* (Oxford University Press 1987).

[66] Michael Tonry, "Racial Disparities Getting Worse in U.S. Prisons and Jails," *in* Michael Tonry and Kathleen Hatlestad, *Sentencing Reform in Overcrowded Times* (Oxford University Press 1997) ("Tonry and Hatlestad").

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[67] *Race to Incarcerate* at 152-153 (*citing* Mumola and Beck).

[68] Mauer Civil Rights Testimony at 8 (citing Bureau of Justice Statistics data).

[69] *Id.*

[70] Marc Mauer and Tracy Huling, "One in Three Black Men Is Ensnared in the Justice System," *in* Tonry and Hatlestad at 246.

[71] Michael Tonry, "Drug Policies Increasing Racial Disparities in U.S. Prisons," *in* Tonry and Hatlestad at 233, 235.

[72] Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System*, at 82 (Cambridge University Press 1996) (*citing* Sam Vincent Meddis, "Is the Drug War Racist?" *USA Today*, July 23-25, 1993, at 2A).

[73] *Id.* (*citing* J.G. Miller, *Duval Jail Report*, filed with the U.S. District Court for the Middle District of Florida, Jacksonville, Florida, June 1993).

[74] *Id.*

[75] *No Equal Justice* at 147 (*citing* Christopher Davis, Richard Estes, and Vincent Schiraldi, "'Three Strikes': The New Apartheid," Report of the Center for Juvenile and Criminal Justice (Mar. 1996)).

[76] *Race to Incarcerate* at 157 (*citing* James P. Lynch and William J. Sabol, *Did Getting Tough on Crime Pay?* (Urban Institute 1997)).

[77] 481 U.S.C. § 279 (1987)

[78] *McCleskey v. Kemp*, 481 U.S.C. § at 325 (Brennan, J., dissenting) (*citing* Baldus study).

[79] *No Equal Justice* at 137.

[80] *McCleskey v. Kemp*, 481 U.S.C. § at 339 (Brennan, J., dissenting).

[81] *See* Ch. II, n. 55.

[82] 517 U.S.C. § 456 (1996).

[83] *United States v. Armstrong*, 517 U.S.C. § at 468, 470.

[84] *No Equal Justice* at 160.

[85] *Los Angeles v. Lyons*, 461 U.S.C. § 95 (1983).

[86] *Id.* at 115-116 (Marshall, J., dissenting).

[87] 517 U.S.C. § 806 (1996).

[88] *United States v. Botero-Ospina*, 71 Federal Reporter 3d 783, 790 (10th Circuit 1995) (Seymour, C.J., dissenting) (citations omitted). For other examples of cases upholding pretextual stops, *see United States v. Harvey*, 16 Federal Reporter 3d 109, 113 (6th Circuit 1994) (upholding a stop in which an arresting officer testified that he had stopped the car in part because "there were three young black male occupants in an old vehicle") (Keith, J., dissenting); *United States v. Roberson*, 6 Federal Reporter 3d 1088, 1092 (5th Circuit 1993) (upholding a stop of a black motorist for changing lanes without signaling on an open stretch of highway).

[89] *No Equal Justice* at 145 (*citing* National Center on Institutions and Alternatives, *Hobbling a Generation: Young African-American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland* (Sept. 1992)).

[90] *Id.* (*citing* American Bar Association, *The State of Criminal Justice* (Feb. 1993)).

[91] "Why 'Driving While Black' Matters" at 295 and n. 132.

[92] *Race to Incarcerate* at 163-165.

[93] *See* Carl Pope, "Racial Disparities in the Juvenile Justice System," *in* Tonry and Hatlestad at 240-244 (surveying studies of race and the juvenile justice system and concluding that studies are "far more evident in the juvenile justice system than in the adult system").

[94] Andrew Blum, "Jail Time by the Book: Black Youths More Likely to Get Tough Sentences than Whites, Study Shows," *American Bar Association Journal*, at 18 (May 1999).

[95] *The Color of Justice* at 2 (*citing* Donna Hamparian and Michael Leiber, *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report*, at 9 (Community Research Associates 1997) ("Hamparian and Leiber")).

[96] *Id* (*citing* Donna Bishop and Charles Frazier, "A Study of Race and Juvenile Processing in Florida," Report Submitted to the Florida Supreme Court Racial and Ethnic Bias Study Commission (1990)).

[97] *The Color of Justice* at 3, 7.

[98] Kevin J. Strom, Bureau of Justice Statistics, U.S. Department of Justice, "Profile of State Prisoners under Age 18, 1985-97," at 1, 4-5 (Feb. 2000) ("Strom").

[99] Jeffrey A. Butts, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, "Delinquency Cases Waived to Criminal Court, 1985-1994," at 1 (Feb. 1997) ("Butts").

[100] Strom at 7, Table 7.

[101] Mara Dodge, "Regrettable Regression in the Way We Treat Young Criminals," *The Washington Post*, Aug. 29, 1999, at B02.

[102] *Id.*

[103] Strom at 3.

[104] Strom at 5, Table 5.

[105] Carol J. DeFrances and Kevin J. Strom, Bureau of Justice Statistics, U.S. Department of Justice, "Juveniles Prosecuted in State Criminal Courts," at 5, Table 5 (Mar. 1997).

[106] Butts at 2.

[107] *The Real War on Crime: The Report of the National Criminal Justice Commission*, at 104 (Steven R. Donziger ed., 1997).

[108] Deborah Prothrow-Stith, *Deadly Consequences* (Harper Collins 1991); Bruce Wright, *Black Robes, White Justice* (Lyle Stuart, Inc. 1987).

[109] Mauer Civil Rights Commission Testimony at 2 (citing Bureau of Justice Statistics data).

[110] *Id.* (*citing* Marc Mauer and Tracy Huling, The Sentencing Project, "Young Black Americans and the Criminal Justice System: Five Years Later" (Oct. 1995)).

[111] *Id.*

[112] *Id.*

[113] *Id.* at 5 (*citing* Henry Louis Gates, Jr., "The Charmer," *The New Yorker*, at 116 (Apr. 29/May 6, 1996)).

[114] Jamie Fellner and Marc Mauer, Human Rights Watch and The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, at 1 (Oct. 1998) ("*Disenfranchisement Laws*").

[115] *Id.*

[116] Felony convictions bring with them numerous other collateral consequences under state and/or federal law, such as ineligibility to serve in government jobs or hold government licenses; ineligibility to enlist in the armed forces; ineligibility for jury service; ineligibility for various kinds of professional licenses, and ineligibility for government benefits. *See* Office of the U.S. Pardon Attorney, "Civil Disabilities of Convicted Felons: A State-by-State Survey," at 7 (1996). Mere arrests can result in eviction from public housing.

[117] Mark Silk, "Solutions to Youth Crime Discussed: Black Prosecutors Look at Alternatives to Incarceration," *The Atlanta Constitution*, July 26, 1994, at C4 (quoting New York City Assistant District Attorney Rhonda Ferdinand).

[118] *Race to Incarcerate* at 185.

[119] *No Equal Justice* at 5 (*citing* John Hagan and Ruth Peterson, "Criminal Inequality in America," *in* J. Hagan and R. Peterson, *Crime and Inequality* (Stanford University Press 1995)).

[120] *Id.* at 170 and n. 6. In explaining this phenomenon, Standish Wills, Chair of the Chicago Conference of Black Lawyers, stated: "[B]lack people, to a great extent, don't have a lot of faith in the criminal justice system." *Id.*

[121] *Id.* (*citing* Jeffrey Rosen, "One Angry Woman," *The New Yorker*, Feb. 28/Mar. 3, 1997, at 54, 60).

[122] *See, e.g.*, Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," 105 *Yale Law Journal* 677 (1995). The reaction of minority jurors is undoubtedly further heightened by the fact that the overwhelming majority of prosecutors are white. For example, one study has shown that in the 38 states that have the death penalty, only 2% of all prosecutors are black or Hispanic, while 97.5% are white. Richard C. Dieter, Death Penalty Information Center, "The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides," at 12-14 (June 1998).

[123] *Race to Incarcerate* at 181 (*citing* Paul Farmer, "Cruel and Unusual: Drug-Resistant Tuberculosis as Punishment," *in Sentenced to Die? The Problem of TB in Prisons in East and Central Europe and Central Asia* (Vivien Stern and Rachel Jones eds., Penal Reform International 1999)).

[124] *Id.* at 182 (*citing* Dorothy E. Merianos, James W. Marquart, and Kelly Damphousse, "Examining HIV-Related Knowledge among Adults and Its Consequences for Institutionalized Populations," 1, 4 *Corrections Management Quarterly* 85 (1997)).

[125] *Id.* at 11.

[126] *See generally Race to Incarcerate* at 81-100 (discussing "the prison-crime connection").

[127] *See* Prosecution and Race at 54-56 (advocating racial impact studies of prosecutorial practices). But until the Supreme Court departs from its holding in *McCleskey* that discriminatory *intent* is necessary to invalidate discriminatory law enforcement practices, mere evidence of racially discriminatory effect will continue to have limited utility in the fight against discriminatory law enforcement practices. Congress could effectively overrule *McCleskey* by passing a broad version of the Racial Justice Act that Senator Kennedy and others proposed in the early 1990s to address racial disparities in capital punishment. *See generally* 137 Congressional Record S. 8263; 102nd Congress 1st Session (June 20, 1991).

[128] Disenfranchisement Laws at 20-22.

[129] *See* Michael Massing, *The Fix* (Simon & Schuster 1998).

Chapter 15

Mixed Reviews on Lesbian and Gay Rights for Bush's First Year

by Lou Chibbaro Jr.*

Introduction

Since taking office one year ago, this President has amassed a record on gay and AIDS issues that is historic for his party. His administration has made four openly gay appointments, including a gay ambassador who moved into the U.S. Embassy compound in Bucharest, Romania, with his same-sex partner.

A popular political operative who worked closely with gay political groups during the Presidential campaign became White House counselor to the President and a high-level adviser to the Vice President, whose lesbian daughter brought her partner to the inauguration.

The President signed a bill allowing domestic partners to register their relationships in the nation's capital, ending a nine-year federal policy blocking this local, District of Columbia ordinance from taking effect.

The anti-gay Family Research Council responded to these and other developments by denouncing the White House for embracing a "homosexual political agenda" and "imparting legitimacy to the homosexual political cause."

Was this the first year of the Clinton Administration? To the dismay of many of the nation's anti-gay political groups, and to the surprise of a number of gay Democratic activists, these developments took place during President George W. Bush's first year in office.

"President Bush has not only confounded his many gay detractors but has also enraged the far right, stood down their criticism, and moved ahead with his inclusive agenda," said the national gay group Log Cabin Republicans (LCR), in a written review that unabashedly gloats over the President's gay rights record.

"Remember how every other gay organization was predicting disaster for the nation and the beginning of an 'extremist' anti-gay era?" Log Cabin states in an essay in its January 2002 newsletter. "What a difference a year has made."

But as Bush ends his first year at the nation's helm, officials with non-partisan gay political groups, like the National Gay and Lesbian Task Force (NGLTF), are far less complimentary in their assessment of his record.

"The President's gay appointments are on the positive side of the balance sheet," said NGLTF Executive Director Lorri L. Jean. "But they may be the only significant positive things he's done, unless you decide to list the fact that he didn't do something bad as a positive."

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NGTLF, for example, notes that Bush has appointed a number of high-level officials from the Republican party's socially conservative wing who have anti-gay records. Among them is Attorney General John Ashcroft, an outspoken opponent of gay rights during his tenure as a U.S. senator from Missouri.

The Human Rights Campaign (HRC), the nation's largest gay political organization, argues that while Bush says he will hire without regard to sexual orientation, he won't say whether he would sign the gay civil rights bill pending in Congress known as the Employment Non-Discrimination Act, which would enact that policy into federal law.

HRC political director Winnie Stachelberg said the administration has not responded to HRC's request that it endorse ENDA and another bill that would give the federal government authority to prosecute anti-gay hate crimes. Both bills have received at least some Republican support in the House and Senate, and HRC claims to have a majority ready to vote for their passage.

"Many questions remain unanswered," Stachelberg said about the administration's gay rights positions.

Stachelberg and officials with other gay civil rights groups acknowledge that while Bush has yet to make major policy advances on gay issues, he has so far chosen not to roll back the advances made by the Clinton Administration.

Bush has left in place two key executive orders issued by President Clinton. One prohibits job discrimination against gay federal workers and the other bans government agencies from denying security clearances to an individual based solely on sexual orientation. Bush has ignored requests by anti-gay groups that he repeal the two orders.

The administration has also continued to allow gay federal workers' groups to meet in government buildings and has continued a Clinton policy of allowing these groups to use government meeting facilities to hold events commemorating Gay Pride week.

However, the White House announced last June that Bush had discontinued a Clinton practice of issuing annual Presidential proclamations designating June as Gay Pride month.

I. Gay Appointments Rile Right Wing

Most gay activists view Bush's gay appointments as a positive development, although some note that Bush hasn't appointed nearly as many gays as Clinton to high and middle level administration jobs during the former President's first year in office.

In June, Bush nominated gay State Department official Michael Guest for the position of ambassador to Romania. The Senate confirmed Guest by a unanimous vote. Secretary of State Colin Powell drew attention in the press when he recognized Guest's domestic partner during a swearing-in ceremony, which Powell administered.

Anti-gay groups were especially angry over the Guest appointment. The Family Research Council opposed the nomination on the grounds that his sexual orientation would be unacceptable to Romanians, but government officials there have dismissed the concern, praising Guest for his experience and knowledge of Eastern European affairs.

When asked by reporters about the gay appointees, White House press secretary Ari Fleischer said Bush bases his appointments on a person's qualifications for the job. Fleischer said Bush considers a person's sexual orientation a private matter that has no bearing on the President's decision to appoint someone to a government job.

II. Anti-gay Appointments

While Bush angered social conservatives by appointing gays to administration posts, the opposite is also true: Gay activists rattle off a number of key appointments they say went to people with right-wing ties who oppose gay rights.

The Ashcroft appointment drew strong opposition from most gay political groups. During his confirmation hearing, Ashcroft, a longtime opponent of gay rights, pledged to uphold existing policies banning discrimination against gay federal workers.

Yet in a development that surprised some political observers, Ashcroft invited officials with Log Cabin Republicans to meet with him immediately after the Senate confirmed his appointment. Log Cabin officials called the meeting a historic development, saying Ashcroft's decision to pick a gay group to be among the first civil rights oriented groups he would invite to his office indicated Ashcroft was moderating his views on gay rights.

Other gay leaders, such as openly gay U.S. Representative Barney Frank (D-Mass.), said they did not believe Ashcroft was sincere in his friendly overtures to gays during his confirmation hearing.

On the plus side, gay activists praised Bush for appointing a number of other top officials who have long-standing records in support of gay civil rights. Among them was pro-gay Republican political commentator and campaign adviser Mary Matalin, whom Bush named as a White House counselor to the President. Vice President Dick Cheney also named Matalin as one of the political advisers to the office of the Vice President.

Bush drew praise from gay activists and strong criticism from anti-gay religious right groups in December, when he named former Montana Gov. Marc Racicot as the new chair of the Republican National Committee.

As governor, Racicot issued an executive order banning discrimination against gays working for the Montana state government and backed a state hate crimes bill that included protections for gays. He is credited with helping to defeat an anti-gay bill introduced into the Montana legislature.

"The Racicot appointment is a message of inclusiveness and tolerance in the Republican party," said HRC's Stachelberg.

Log Cabin Republicans spokesperson Kevin Ivers called the Racicot appointment a turning point in the Republican party's handling of gay issues. Ivers noted that Racicot is the first RNC chairperson with a solid record of support on gay issues.

III. Tacit Domestic Partnership Support?

HRC joined Log Cabin in praising Bush for not opposing a decision by Congress to remove language from the D.C. appropriations bill that prohibited the city from implementing its domestic partners law. Political insiders, including anti-gay groups, interpreted Bush's action as a gesture of tacit support for the domestic partners program.

Gay legal groups, meanwhile, expressed only cautious optimism over the Bush Administration's handling of a federal compensation program to assist survivors of the victims of the September 11 terrorist attacks.

Joe Grabartz, an official with a New York State gay organization that has advocated for same-sex survivors of the terrorists attacks, called the program "groundbreaking" for at least allowing same-sex couples to apply for victim compensation.

2001 Executive Review

A look back at the actions, appointments, and decisions affecting gays during the first year of the George W. Bush Administration

January 20

Bush nominates John Ashcroft to be U.S. attorney general. Ashcroft, a strong opponent of gay rights while serving in the U.S. Senate, promises during his confirmation hearing to comply with existing rules barring anti-gay discrimination against federal workers. He pledges to allow a gay group at the Justice Department to continue to operate and meets with Log Cabin Republicans during his first week in office.

Bush appoints Mary Matalin as White House counselor to the President. Matalin has worked closely with gay Republicans while serving on the Bush Presidential campaign. Religious right groups criticize her for being too supportive of gay rights.

Bush nominates Christine Todd Whitman as head of U.S. Environmental Protection Agency. Whitman brings a strong record of support on gay and AIDS issues as governor of New Jersey.

Bush nominates Massachusetts governor and gay civil rights supporter Paul Cellucci as U.S. ambassador to Canada. Cellucci's support on gay and AIDS issues prompt several religious right groups to oppose his ambassadorial appointment.

April 9

Bush's first budget calls for significant increases in funds for AIDS research at the National Institutes of Health, modest increases for AIDS prevention programs, and no increase for the Ryan White CARE Act program, which assists states and cities in treatment and social services programs related to AIDS.

Bush appoints Scott Evertz, an openly gay Republican and head of a private-sector AIDS program in Wisconsin, as director of the White House National AIDS Policy Office.

April

Secretary of Defense Donald Rumsfeld appoints openly gay business executive Stephen Herbits as temporary consultant on Pentagon civilian personnel matters. Rumsfeld brushes aside criticism from conservative groups that denounce the appointment.

The U.S. Department of State retains Clinton Administration guidelines banning sexual orientation discrimination against gay Foreign Service employees.

May 25

Bush nominates Timothy Tymkovich, the Colorado state's attorney who argued the case for retaining an anti-gay ballot measure Amendment 2, for a seat on the U.S. Court of Appeals for the 10th Circuit, which has jurisdiction over Colorado and other Western states.

June 2

Bush discontinues Clinton practice of issuing a Presidential gay pride proclamation in June to commemorate the nation's gay pride festivals.

July 11

The Senate confirms Bush nominee Kay Coles James as director of the Office of Personnel Management. James, a 52-year-old conservative Republican and evangelical Christian from Virginia, has ties to the anti-gay Family Research Council. James angers gays in December when she decides that OPM will not make same-sex domestic partners eligible for long-term health care insurance under a new federal program. Sources familiar with OPM say James was concerned that adding another category could subject the program to legal challenge.

July

The White House denies reports that it has cut a deal with the Salvation Army to exempt the charitable group from complying with local and state gay civil rights laws in exchange for the group's support for President Bush's faith-based initiatives legislation. Critics charge that the White House backed away from the deal after the Washington Post ran stories describing private meetings between Salvation Army officials and chief White House political adviser Carl Rove.

August 22

Bush appoints Donald Capoccia, an openly gay real estate developer, as a member of the U.S. Commission on Fine Arts.

September 18

Michael Guest, an openly gay U.S. Foreign Service officer, begins serving as U.S. ambassador to Romania after Bush nominated him for the post in June. Secretary of State Colin Powell administers the oath of office to Guest at a State Department ceremony attended by Guest's domestic partner and parents.

October 1

Bush appoints Robert Reilly, a conservative who called homosexuality a 'morally disordered' condition in a National Review article in 1996, to the post of director of the Voice of America. Reilly vows to uphold anti-discrimination policies pertaining to gay federal workers under his charge.

October 11

Bush, through his budget director, Mitch Daniels, informs Congress that he has no objection to an appropriations bill that allows Washington, D.C., to implement its domestic partners law. The appropriations bill, which Bush signed this month, lifts a nine-year-old federally imposed restriction that prevented the city from putting the domestic partners law into effect.

November 30

Secretary of Health & Human Services Tommy Thompson names Patricia Funderburk Ware, a longtime proponent of sexual abstinence as a means of curtailing AIDS, to be executive director of the Presidential Advisory Council on HIV/AIDS. The 35-member council's chairperson and members, not the executive director, set the panel's priorities and positions. Some view Funderburk's appointment as a signal that the Bush Administration may replace current members, including several openly gay members, with conservatives similar to Funderburk.

December 5

Bush announces the appointment of former Montana Gov. Marc Racicot as chair of the Republican National Committee. Racicot supported a Montana hate crimes bill that included protections for gays and is credited with helping to defeat an anti-gay bill introduced in the Montana legislature. Religious right groups had said he was unacceptable to them at the time Bush considered Racicot for the U.S. attorney general's post.

December 20

The Justice Department (DOJ) decides to allow same-sex partners of victims of the September 11 terrorist attacks to apply for federal victim compensation funds. But in a set of detailed regulations, the DOJ delegates authority to local and state probate courts to decide whether surviving same-sex partners would be eligible to receive compensation, turning down a request by gay advocacy groups that an appointed federal master, rather than state or local probate courts, make such decisions.

IV. AIDS Record

Some AIDS activists said Bush's appointment of Scott Evertz as director of the White House AIDS office was an important symbolic development because it recognized the strong interest in AIDS issues within the gay community. Evertz was head of the Log Cabin Republicans of Wisconsin and an official with an AIDS service agency when Bush tapped him for the White House post.

But groups such as the National Association of People With AIDS (NAPWA) called Bush's record on AIDS mixed, saying Bush has retained the Clinton Administration's overall policies, which some AIDS activists have called adequate but not sufficient to address the AIDS epidemic.

NAPWA Executive Director Terje Anderson noted that Bush's first budget included no funding increase for the highly acclaimed Ryan White CARE Act program, which assists states and cities in providing medical care and social services to people with HIV and AIDS.

In a pattern begun with the Clinton Administration, Anderson noted, Congress added more Ryan White funds, even though Bush did not ask for an increase. The Bush budget office did not oppose the increase.

Bush has been credited with promoting a newly created Global AIDS Trust Fund, which is aimed at helping people with AIDS in developing countries. But the President's decision to allocate only $200 million as a "start-up" for the program has been viewed by AIDS advocacy groups as inadequate.

Bush retained a Presidential AIDS advisory panel created by Clinton, relieving fears by some AIDS activists that he would abolish the panel. However, he drew criticism from some of those same activists by appointing Patricia Funderburk Ware, a longtime proponent of sexual abstinence as a means of curtailing AIDS, as the panel's new executive director.

The panel, which included a number of openly gay members, distanced itself from Clinton in 1998, when it issued a vote of "no confidence" against Clinton for his refusal to provide federal funds for needle exchange programs aimed at stopping the spread of AIDS among injection drug users. Bush's secretary of Health and Human Services, Tommy Thompson, has been replacing the panel's Clinton appointees as their terms expire.

"For the most part, the new administration has continued the policies of the Clinton Administration," said NAPWA's Anderson. "To many of us, that's OK, because some people feared they would pull back from what we have now."

Log Cabin officials say the Bush Administration has given Evertz the green light to work closely with a wide variety of constituencies, including gay and AIDS advocacy groups, to help shape the administration's policy on AIDS in the next three years.

V. "Stealth Approach"?

Political science professor Larry Sabato of the University of Virginia, a recognized expert on U.S. electoral politics, said Bush's handling of social issues, including gay rights, has been considerably more moderate during his first year in office than his campaign rhetoric would have suggested.

Sabato said Bush's decision to appoint gays to his administration and his decision to retain the Clinton gay rights executive orders is due, in part, to a genuine desire to oppose discrimination, but most likely a sign of pragmatic politics. "He can count votes," said Sabato, who points to Bush's narrow Electoral College victory over Democrat Al Gore and Gore's popular vote victory over Bush.

"Andy Card [Bush's chief of staff] and Carl Rove [the White House chief political advisor] most likely convinced him that he will need millions of more votes in 2004 just to stay even with his Democratic opponent," said Sabato. According to Sabato, changing demographic trends among the nation's voters, including a greater prominence of immigrants, favor the Democratic party.

"There just aren't many more white male votes to mine," Sabato said. "So he has to do better with women, African Americans, Latinos, and gays. He must cut into that vote to stay competitive."

"They know they have a lot of contradictory elements within their big tent," said Sabato. "They want to please both sides if they can. But the President has already tipped his hand. He wants it to be known that he has no desire to be prejudiced against gays or Arab Americans, or a whole host of other groups."

But Chad Johnson, executive director of the gay group National Stonewall Democrats, said the administration's record on gay civil rights and AIDS is not as strong as some activists are making it out to be.

"They talk and do different things," said Johnson. "They talk about being compassionate conservatives and try to put on a nice face. But when it comes to issues of interest to our community, they are as far right as the religious right. They use a stealth approach to doing this."

Martín Ornelas Quintera, executive director of the national gay Latino group LLEGÓ, said his group is concerned that the administration's crackdown on terrorism will ensnare innocent immigrants, including gay immigrants, who are seeking entry into the United States to find employment.

"As a community of color, we sometimes appear Middle Eastern," Quintera said. "We are at risk of being stopped, just because of how we look."

Campbell Spencer, the national lesbian and gay outreach director for the Democratic National Committee, said Democratic party leaders are "profoundly disappointed" in Bush's first-year record on gay civil rights. Spencer said the Democratic party was about to adopt a resolution calling on same-sex domestic partners to be eligible for the same Social Security benefits now available to married couples.

"Were we to have a Democratic leader in the White House, the gay and lesbian community would be moving forward and building on the incredible successes of the Clinton years," Spencer said.

But Log Cabin officials say the administration's overall record on gay rights and AIDS is positive.

"We're proud to report that one year later, President George W. Bush has governed exactly the way he promised he would," Log Cabin's newsletter states. "He won LCR's endorsement on the promise to be an inclusive Republican President and to lead a new, more inclusive Republican party. And our President has come through in his first year. Promise made, promise kept."

Chapter 16

High Classroom Turnover: How Children Get Left Behind

by Chester Hartman[1]

Introduction

A 1994 U.S. General Accounting Office study reported that by the end of the third grade one out of six children had attended three or more schools, and that students often changed schools more than once during the school year.[2] A Texas study found that one of six students in the state's public schools[3] changed schools during the 1994-95 school year.[4] A National School Boards Association article[5] reports, "it's not unheard of for a child to change schools six or seven times in a single year." A Las Vegas elementary school reported 700 transfers in or out in a single year among a total student body of just over 900.[6] A California study reported that approximately one-quarter of students made unscheduled school changes three or more times over the course of their public school career.[7] While a majority of California high schools have student mobility rates ranging between 10 and 30%, approximately 20% of the state's high schools have very high student mobility rates — more than 30%.[8] Not surprisingly, high mobility rates are even more daunting when viewed over time: Over the course of four years, overall school stability can fall to under 50%.[9]

The extensive literature on problems with the county's education system, along with the many proposed and needed reforms, has paid far too little attention to the issue of transiency, or high classroom turnover. And while there is a modest amount of literature in the professional, academic, and technical journals, little appears in general circulation periodicals that speak to the wider public.[10] Smaller schools and classrooms, better trained teachers, better buildings and equipment, and other essential improvements can have only minimal positive impact if the classroom is something of a revolving door, with high proportions of the students leaving and arriving during the school year and from school year to school year (although a case can be made that instituting reforms such as these might serve to reduce transiency).[11]

In locales receiving large numbers of immigrants, there is of course a fairly steady influx of such children entering the school system throughout the school year — students with acculturation and language issues that require special attention. Beyond the special case of immigrant-receiving communities, to the extent the incidence of such transiency is disproportionately higher among certain identifiable groups — in particular, low-income, homeless, farmworker, and minority children — the already inadequate education received by such students is grossly magnified. Research from the University of Chicago's Center for School Improvement reported that "a disproportionate number of predominantly African-American schools have low stability" and that such students are twice as likely as white students to switch schools in the middle of the year.[12] An Austin study reported that "low-income, African American and Hispanic students were more likely to be mobile than middle-income or White peers."[13] A Minneapolis study reported that "students of color moved far more often than white students" and that "1 in 4 low income students moved one or more times during the study. Only 1 in 10 students who did not qualify for the free lunch program moved."[14] In California, ". . . mobility was clearly related to family income and socioeconomic status — low-income students were more mobile between the 8th and 12th grades than high-income students."[15]

In sum, there is clear need for recognition of the problem of transiency: its magnitude, incidence, causes, and results. And based on that knowledge, there is concomitant need to mount a serious attack on the problem, reducing it where possible, handling it in the most constructive manner where it persists. The federal government, as well as state governments and most school districts, have not dealt with this serious issue in any way commensurate with the problem. And unless policies and programs are put into place to deal with the fact that "schools [mainly urban schools] are actually unstable places where the movement of students penetrates the central aspect of school work — the interaction of teachers and students around learning,"[16] there will surely be millions of children left behind.

Students of course move from one to school to another when passing through the various grade groupings — elementary, middle, and high schools. Our concern is with (non-promotional) moves that occur within those groupings. Some occur in between school years, others within a school year. While both of those changes may have deleterious effects, obviously the more disruptive of the two are within-school year changes. As a Los Angeles study concluded, "Intraschool [within school year] site transfer is especially damaging to the instructional program."[17] Not all such changes are damaging or undesirable: Families may move in order to improve their housing or work situation; students may change to a different school or classroom in order to secure a more appropriate educational environment or leave an unsatisfactory or damaging one. A very large portion of such moves, however — almost certainly the majority, particularly for low-income, minority, homeless, and farmworker students — are triggered or necessitated by factors that are not associated with positive change for the family or student.

What triggers such potentially damaging moves may be categorized as either external to or internal to the school situation and environment. The former category consists primarily of residential changes on the part of the student's family, which in turn may be caused by the workings of the housing system or (less frequently) by changes in the household situation, such as family breakup; the latter refers to a range of reasons, including expulsion by school authorities and problems or dissatisfactions on the part of the student and his/her family that lead to transfers. In the case of lower income, minority, homeless, and farmworker children — the principal concern of this chapter — residential changes are for the most part not under the family's control or, in the case of farmworkers, are dictated by expected and planned changes in employment location. The housing-related forces that cause involuntary residential changes include eviction or mortgage foreclosure proceedings,[18] anticipated eviction, inability to pay rent or utility bills, housing code enforcement, eminent domain actions, condominium conversions, upgrading rehabilitation, and other gentrification pressures.

To the extent such involuntary residential moves, as well as "push" factors from within the school environment, cause harm to a student's education, it is certainly an important goal of public policy to reduce their incidence wherever possible. A second public policy goal is to put in place systems that, to the extent feasible, minimize the deleterious impact of these moves. Such steps are vital if we are to take seriously the right of all children to an adequate education.

I. What the Research Shows Regarding Academic Performance

High student mobility has consequences for mobile students, nonmobile students, teachers, and schools. For students, the long-term effects of high mobility include lower achievement levels and slower academic pacing, culminating in a reduced likelihood of high school completion. Data on how highly mobile classrooms affect nonmobile students in those classrooms are rare, but in all likelihood such patterns significantly retard curriculum pacing and decrease social and educational attachments to fellow students.[19] Migrant farmworker children, who arrive and leave in relatively large numbers, staying for just a short period, are particularly disruptive for the nonmobile students in these classrooms. (In Washington State, one school segregated migrant students from regular classrooms, holding that integrating them would be too disruptive to the school.) For teachers, although again there are no available data, it is likely that teaching and teaching satisfaction suffer from the need to repeat and review lessons, constantly introduce new students to the class, experience the sudden departure of other students, and preside over a generally less stable environment. For schools, high mobility rates clearly place a strain on school resources — an example being loss of textbooks when departing students fail to return them.[20]

Regarding what causes this mobility, the primacy of housing instability as the trigger to move a child out of his/her classroom is evident in several reports. As a general phenomenon, "families that are poor move 50% to 100% more frequently than families that are not poor."[21] The Chicago study documented that 58% of elementary school changes were related to residential moves.[22] In California, parents reported approximately 55% of high school changes were associated with residential moves.[23] A Minneapolis study reported that of the residential moves, 80% were associated with housing problems, such as substandard conditions, inability to find affordable housing, problems with landlords, evictions, or property condemnation.[24,25] But residential moves are sometimes made for reasons other than coping with a housing issue, such as lack of transportation or availability of employment.

Homelessness — the ultimate housing problem — is of course a major reason why children must change schools. And since the child's school is usually his or her second most important stable environment, losing both home and school represents a doubly powerful blow. It is not uncommon for homeless families to move several times a year, and as a result, homeless children may change schools several times. Homeless children continually face difficulty in school: For example, young children may lag behind in basic skills acquisition; high school age children often drop out due to difficulty in accumulating credits or schools' refusal to enroll unaccompanied youth. Two prevalent educational practices that exacerbate the negative impacts of mobility for homeless children are application of residency rules and failure to provide transportation.[26] A further significant problem for such students is failure to transfer school records, leaving the new teacher with inadequate information as to the child's past preparation and current needs. A recent development is the establishment of "shelter schools," opened in homeless shelters, a controversial, possibly illegal step with as yet unstudied implications for classroom transiency.[27]

Welfare reform has had a still incompletely documented impact on residential, hence school, mobility.[28] Employment programs may necessitate a move in order to arrange a workable commuting pattern; and those who reach welfare support time limits may no longer be able to afford rent and utility payments. Research on welfare reform suggests that those who leave the welfare rolls are more likely to be residentially mobile than those who remain on welfare, doubtless caused in large part by employment opportunities that require or prompt a move. Such "success" thus has costs and unintended consequences. People who leave welfare are also somewhat more likely to have trouble paying rent, to be evicted, or to move their children in with another family because of inability to maintain a household continuously.[29] More distant moves — from one state to another in response to state differences in welfare policies (or scarcity of affordable housing) — also are reported. A 50-state survey indicated that welfare reform may lead to unstable family income, which in turn creates a greater likelihood that children will experience turbulence, such as more residential and school changes.[30] A National Association of Child Advocates presentation concluded, "evidence suggests that welfare reform has increased student mobility for a small but particularly high risk population of students."[31]

As noted above, migrant families, largely located in Texas, California, and Florida, typically move temporarily from a homebase community to other communities within the state or other states, following harvests and crop-related agribusiness in migrant streams. As a report in the *Title I Monitor* described their situation: "[T]he mobility of migrant children plays havoc on the planned schedules of this nation's schools. These children ping-pong from school to school, swelling classrooms for often brief periods until they leave again. Because of variations in weather, changes in crops, and the difficulties in finding work, migrant families have in recent years been forced to alter traditional patterns of migrancy, often traveling to new states or even new regions of the country in search of work."[32] These increasingly fragmented migrant streams have expanded to become international as well. And so migrant children typically change schools several times a year. Similar to homeless children, migrant children often face barriers to enrolling in schools; youth often have difficulty accumulating academic credits and therefore face difficulty completing high school. The records transfer problem noted above for homeless children is even more severe for children of migrant families, as their moves generally are far more distant. Since the vast majority of migrant family school-age children are Latino, language and cultural adjustment problems are prevalent. Research consistently finds that migrant children face limited educational opportunities, oftentimes resulting in high dropout rates as well as low achievement rates and slower academic growth.[33]

Foster care children often have to change schools each time they are removed from a home. The failure of local child protection systems to make prompt placements adds to this instability.[34] Like homeless and migrant children, foster care children can have difficulty with transfer of records, including health records. Additionally, children who are having difficulty negotiating the stresses of being placed in foster care are often disproportionately moved to special education classes as a result of behavioral problems.

While residentially related reasons produce the majority of mobility, at least among the subpopulations that are the primary concern of this chapter, it is also important to recognize that a considerable portion of mobility is not associated with residential changes. Among the nonresidentially related reasons for school changes reported in the

Chicago study, 76% were motivated in whole or part by dissatisfaction with the school, trouble with peers or teachers, academic difficulties, or school safety concerns.[35] Interviews with students in California revealed that a majority of student-initiated high school changes were made in order to escape a bad situation (social isolation, unsafe conditions, etc.) rather than to seek a better situation, and that school-initiated transfers were administrative decisions in response to a disciplinary situation, poor attendance, truancy, or poor achievement.[36]

Research findings on the academic impact of high student mobility show that it can have a slowing effect on basic skills acquisition, which has the long-term effect of increasing the chances of school failure and dropout. A review in the *Journal of Research and Development in Education* concluded: "[T]he educational research literature seems quite consistent with regard to findings that high student transiency rates are strongly and negatively associated with academic attainment at school."[37] A carefully designed study of data from the National Health Interview Survey concluded that "frequent family relocation [school changes were not recorded, but the relationship between residential and school relocation is obvious] (approximately five or six moves over the life of the child [6 to 17 years old in this study] . . . was significantly associated with an increased risk of failing a grade and with multiple, frequently occurring behavioral problems [which of course are associated with poor school performance as well]."[38] For elementary students, the negative educational impacts are especially obvious. Students who are highly mobile during their elementary school years are much more likely to change schools during their high school years.[39] In Chicago, even after controlling for socio-economic status, mobile students on average have lower student achievement scores than their stable counterparts.[40] With just one move, students appear to recover over time, but each additional school change results in a cumulative academic lag. Over a period of six years, students who have moved more than three times can fall a full academic year behind stable students.[41] A study of reading achievement tests in California showed that students who moved three or more times scored nearly 20 points lower than students who did not move.[42] And "there is overwhelming evidence that mobility during high school diminishes the prospects for graduation: students who changed high schools even once were less than half as likely as stable students to graduate from high school, even controlling for other factors that influence high school completion."[43] High school changes may disrupt credit accumulation and therefore affect graduation levels.[44] Students who changed high schools at least twice were more than 30% less likely to graduate than students who remained in the same school throughout their high school career; the graduation rate of students who moved at least twice is approximately 60%.[45] The graduation rate of migrant students is about 50%.[46] Attendance is related to mobility and to school performance. The Minneapolis study reported: "Attendance proved to be a strong predictor of performance for students in the study, a correlation found in other local and national research. . . . The less students moved, the better their attendance rates. Students who did not move during the course of the study had an average attendance rate of 94%. Students with three or more moves dropped to an 84% average rate."[47] Schools' failure to track students who leave and to transfer records promptly doubtless is one important factor affecting attendance. Student mobility also affects students' engagement with schools, resulting in increased incidents of misbehavior and lower participation in school activities.[48] Children who move around a lot not only get a poorer educational experience, they also are subject to social and emotional stress caused by disruption in their relationships with classmates and teachers.

For schools, high student mobility rates place a greater burden on their resources and budgeting. Teachers have reported that student mobility can affect decisions related to personnel and staffing, resource utilization, school program planning, instructional delivery and continuity, curricular pace, and student evaluation.[49] Student mobility can also constrain staff time, detract from per pupil resources, and slow school-improvement and community-building efforts.[50]

II. Government Roles and Responsibilities

The federal role in education primarily focuses on meeting the needs of disadvantaged students, and certainly the subgroups who are most mobile are among the most disadvantaged — their high mobility rates adding considerably to their other disadvantaging characteristics. Despite what should suffice as overwhelming evidence of the magnitude and deleterious impact of high classroom mobility (only a portion of which has been presented here), there has been a far too minimal role and responsibility taken by the various levels of government to deal with the issue. What little there is that specifically deals with transiency problems appears in legislation and programs for those most obviously transient: homeless and farmworker children. Funding states receive through the Elementary and Secondary Education Act does provide important supportive educational services, but for the most part in the form of general assistance for a larger class of problems rather than that focused specifically on problems caused by high mobility.

Pursuant to the Stewart B. McKinney Homeless Assistance Act's Education for Homeless Children and Youth program, reauthorized/signed into law in January 2002 as the McKinney-Vento Homeless Assistance Act, homeless children and youth have a right to equal access to the same free, appropriate, and nonsegregated public education provided to other children.[51] The original and reauthorized Acts impose a duty upon state and local agencies to remove barriers to enrollment, attendance, and success in schools. The newly reauthorized Elementary and Secondary Education Act and the new McKinney-Vento legislation provide new strength to provisions designed to keep children who become homeless in their school of origin, for the remainder of the academic year even if the child is permanently housed outside that school's boundaries (subject of course to parents' or guardians' wishes); provide that if the homeless child chooses to attend a school in a more convenient location, the school shall immediately enroll the child even if appropriate records and proof of residence are unavailable, and the school is obligated to obtain necessary records from the child's previous school; require local education agencies to provide and pay for transportation to and from the school of origin (and in cases where the student relocates outside the district served by that agency that obligation falls on the agencies in both areas); bar (with grandfathered exceptions in four designated counties) segregation of homeless students in separate schools or separate programs/settings within schools. The newly reauthorized ESEA requires states to coordinate their Title I plan and services with the McKinney-Vento Act.[52]

Useful examples of state and local government policies and programs are as follows: Illinois state law requires school districts to share responsibility when homeless children cross district lines.[53] The Victoria (Texas) Independent School District, with a heavily Latino enrollment, has implemented, as part of its McKinney program, a "One Child, One School, One Year" policy that supports homeless students' efforts to remain in their school of origin, by providing transportation services; creating a Family Connection program that operates after-school community homework centers located near subsidized housing developments, low-rent motels, and homeless shelters; operating a Parent Place to check out school materials, provide snacks, and run small computer labs; appointing parent liaisons who counsel highly mobile families; and coordinating services for children and their families in transitional living situations.[54] The Houston Independent School District also has a "One Child, One School, One Year" policy, and its transportation department will bus homeless kids anywhere in the district.

The Migrant Education Program, funded under Title I of the ESEA, provides supplemental help to support the educational needs of migrant children, in recognition of the fact that the local education agency-based structure of the basic Title I program did not meet the needs of children who constantly are on the move from school district to school district. Funds are available for summer and intersession programs, tutoring and counseling, and accurate credit accrual and records transfer systems. This last-mentioned issue is of particular salience, given that children of farmworker families move considerable distances (often interstate). Health as well as academic records are crucial — the former particularly important, given the multiple dangers of farm labor from pesticides and dangerous equipment, the possibility of over-immunization, and generally poor access to health care. Texas' New Generation System,[55] developed by the Texas Education Agency, and supported by a consortium of state migrant education programs, provides to subscribers Internet access to a comprehensive (but confidential) database of education and health information on more than 200,000 migrant children, school facilities where migrant children have been enrolled, a range of general information, and a toll-free technical assistance line. Other Texas-initiated programs are Project SMART [Summer Migrants Access Resources Through Technology], a national distance learning program, using public television stations, cable operators, tapes, and videocassettes, available in nearly two dozen states;[56] ESTRELLA, "a [five-year interstate initiative] program using laptop computers to transform the home into a dynamic learning environment," designed for students home-based in Texas;[57] and the Texas Migrant Interstate program, whose goal is "to increase the graduation rate of migrant students by promoting coordination/cooperation of migrant education programs that provide services to migrant students."[58] A National Hotline for Migrant Families, sponsored by the U.S. Department of Education, provides assistance with education issues (in addition to assisting with health, housing, food, and clothing problems).[59] To deal with the increasingly salient issue of back-and-forth Mexican-U.S. migration, the Binational Migrant Education Program provides a range of services. In the education area, these include a binational teacher exchange program, a free textbook distribution program, adult literacy programs, and binational document transfer services.[60] The recently passed Elementary and Secondary Education Act reauthorization contains significant strengthening of existing records transfer provisions, and also adds provisions tightening the parent involvement requirements.[61]

III. Recommendations

There is a great deal that can and should be done to reduce damaging mobility and to handle mobility in the most constructive way when it is unavoidable. A crucial threshold step is making policymakers in a variety of areas, as well as the general public (parents in particular), aware of the prevalence and severity of the problem and the ways it may inadvertently be caused or exacerbated by various public policies. Policy changes are needed at all levels of government, and in far more areas than just the sphere of education. A starter list includes:

A. Education Policies at the Federal, State, and School District Level

The federal accountability framework should provide adequate safeguards, and enforce them strictly, to ensure that state and local entities protect educational rights for highly mobile students. In particular, the federal government should take the lead in improving records transfers and communications among states and school districts, as well as between the United States and countries (notably Mexico) that regularly send migrant workers to the United States.

States should mandate standardized collection and reporting of school mobility data, as a vital tool in understanding the nature of the problem and devising solutions. According to a survey of state departments of education research and assessment officials conducted by the Harvard Graduate School of Education's Principals' Center, "few state departments of education report student mobility rates" and although "school districts typically report some form of student mobility rate . . . its pervasiveness is difficult to assess because equations are based on varying formulae and timetables." (The Center's report also notes that "national data on student mobility is particularly scarce.")[62] State leadership and a supervisory role are particularly important with respect to interdistrict moves, as well as ensuring that adequate attention and responsibility exist for the time between school moves, as there often is a several-week period when the student is attending no school at all.

While federal and state government have key roles to play in mandating responsibility and providing necessary resources, it is at the local level that changed practices are needed and where effective improvements can manifest themselves. School districts should make every effort to retain students who move a short distance (even if they move out of the district), at least until the end of the school year. To the extent this requires transportation assistance, this should be made available. When students do leave, health and academic records should be promptly transferred to the receiving school. Best practices of some local school districts should be widely promulgated for adoption all over the country. As one example, the Minneapolis Public Schools enable students to maintain school continuity whenever possible, so only approximately 5% of intradistrict student mobility results in school changes.[63] Among their practices is institution of a districtwide curriculum that ensures that children who move frequently will find their new classrooms at approximately the same instructional point as the classroom they left. The work of the Victoria Independent School District described above is a model, particular for families in transitional housing situations. The Chicago Panel on School Policy has promulgated a Mobility Awareness Action Plan (titled "Staying Put"), designed to make educators, students, and parents aware of the damaging academic and social consequences of student mobility; promote establishment of school-based programs to deal with mobile students; and disseminate information about the Chicago public schools' open enrollment policy as an alternative to changing schools. Their brochure, "If You Move . . . your children could lose more than their next door neighbors," imparts basic data on the negative consequences of changing schools, outlines existing rights to avoid an unwanted transfer, and provides "If you do move" tips.

A case study of a Los Angeles elementary school with extraordinarily high (60-90%) annual transiency rates among its exceedingly poor, overwhelmingly Latino student body illustrated the many ways in which unavoidable transiency can be handled as humanely as possible to create a "culture of caring." Included in the school's armamentarium of approaches are a sensitive intake process; restructured classrooms to handle the problem of limited English proficiency; team structures to support teachers, students, and parents; and strategies for providing individualized instruction.[64] Las Vegas uses a "buddy system" to ease the adjustment period for newcomers, pairing each arriving student with a long-timer.[65] School construction plans and policies should factor in the impact on mobility required by such activities; attention should be given to alternatives that call for rebuilding schools in existing neighborhoods over new construction in more outlying locations.[66] Local school board redistricting decisions, fraught as they already are with so many considerations, focusing primarily on race and class concerns, should also take into account the impact on student mobility.[67] And to the extent that issues such as school suspension policies and dropout prevention programs intersect with mobility, they need to be handled with that problem in mind, particularly since those issues disproportionately impact the same student populations who are highly mobile.[68]

A somewhat different aspect of school policies has to do with the recent move toward accountability, embodied in the reauthorized Elementary and Secondary Education Act, which has much to offer in ensuring educational rights. Highly transient schools are very likely to show up poorly in performance indicators and other measures by which they are evaluated.[69] This creates the risk that transient children may be left outside the boundaries of public accountability. In particular, we must guard against the possibility that accountability systems will increase interschool mobility by creating incentives to transfer students as a method of excluding students from school data. It is vital that all students be included in whatever accountability systems are created. And of course the concomitant obligation is to provide whatever assistance is needed to ensure that mobile students do not fall behind. Accountability systems can employ strategies and policies, use multiple measures, create shared responsibility for students, provide opportunity to learn standards, and evaluate student progress over a period of years in order to hold schools accountable for *all* students. Implementation of accountability systems that employ high-stakes strategies without investing in opportunities to learn will inevitably lead to unacceptable results.

B. Housing Policies

Whereas there is overwhelming evidence that the majority of school mobility is a function of housing mobility, the school mobility literature has paid surprisingly little attention to housing policy reform — virtually all recommendations focus on school policies. But as a study using National Health Interview Survey data concluded: "our findings . . . suggest that residential stability may mediate the ill effects associated with children's school lives."[70]

The greatest boost to residential stability — hence to school stability — of course would come from a vast increase in the supply of decent housing affordable to all. That would create a situation where pressures to move — from demand exceeding supply, unaffordable rent increases, gentrification, and other destabilizing market forces — would be markedly reduced. Ideally, such new and newly rehabilitated housing should be produced by socially oriented, rather than profit-oriented, entities. A program to accomplish this goal will require far greater amounts of government subsidies than now are provided, plus stronger direction of these subsidies into the below-market sector.[71]

Over recent years, there has been a massive loss in the supply of low-income housing units. Housing trends nationally reflect a decreasing supply of housing that is both affordable for and available to low-income families, generally resulting in a sharp decrease in the supply of affordable private market rentals.[72] Minorities of course still face overt and covert discrimination on the part of the various housing gatekeepers. Since existing research indicates that housing instability and changes are the principal trigger for school changes, and since for lower income, minority, homeless, and farmworker families such changes tend to be largely involuntary, any substantial reduction in the incidence of housing-related school changes necessarily involves intervention in the housing system. That small portion of the nation's housing stock that is in public and nonprofit ownership offers the most hopeful prospect for reduction in undesirable school changes; since such housing is disproportionately occupied by those families who are the primary concern of this chapter, some important gains are possible here. We recommend the following:

- Local public housing authorities should be made aware of the impact of forced displacement on children's education. Notably, the HOPE VI program, which is demolishing tens of thousands of units in public housing projects all over the country and displacing occupants,[73] should at a minimum time its displacement activities so as to avoid the necessity for children to change schools during the school year; and family relocation programs should factor in locational considerations so as to minimize the probability that students will need to change schools. The federal Department of Housing and Urban Development (HUD) should mandate such planning procedures for local housing authorities. Similarly, eviction actions initiated by local housing authorities should take into consideration such timing questions and insofar as possible not act so as to impose unnecessary educational damage on families they feel they must remove.
- Community development corporations (CDCs)[74] and other nonprofit sponsors/owners/managers of housing — entities that are in the housing business not to maximize profits but to provide a decent residential environment at the lowest cost — should take school relocation issues into account when they feel they must force tenants to move.

Privately owned rental housing of course is more difficult to regulate or influence; owners of such housing generally have little interest in the overall welfare of their tenant families, and in their efforts at profit maximization will take steps detrimental to sitting tenants. What can help such tenants most in creating the residential stability that in turn ensures school stability for their children are local and state regulations creating something along the lines of a "right to stay put."[75] Obviously, rent and "just cause" eviction controls, as well as condominium conversion and demolition controls, can do a great deal to ensure residential stability, and to the extent that in turn ensures school stability, this adds to the argument that such housing regulations benefit those being harmed by the workings of the unfettered housing market.[76] To the extent that various federal, state, and local anti-discrimination laws help create additional stability, these too can assist in reducing school mobility problems; and expanding the category of factors that fall under such laws will add to such protections. Mortgage foreclosure programs and eviction prevention programs in place in some localities provide an additional source of stability, and these should be adopted widely.[77]

The society's interest in promoting school stability — which can and should be enhanced via dissemination and wider understanding of research results showing the harm caused by instability — might also lead to limited eviction protections based explicitly on avoiding the harm of forced moves during the school year. We already have scattered laws that forbid or postpone eviction, at least temporarily, under certain circumstances. Examples are local ordinances that disallow eviction (or utility shutoffs, which can effectively force people to move) when the temperature falls below a certain level. An amendment to the District of Columbia Landlord-Tenant Act (section 2, D.C. Act 4-143, new section 501a) stipulates that "no landlord shall evict a tenant on any day when the National Weather Service predicts at 8 a.m. that the temperature at the National Airport Weather Station will not exceed twenty degrees Fahrenheit within the next twenty-four hours." And the 1940 Soldiers' and Sailors' Civil Relief Act (besides requiring temporary reduction in mortgage interest rates, hence monthly payments) forbids or closely regulates evictions and mortgage foreclosure actions for reservists and National Guard personnel called up for active duty.[78] Relatedly, the Secretary of Housing and Urban Development issued a telegram in February 1977 ("Subject: Weather/Fuel Shortage Problems") to all HUD regional and area offices enunciating a policy that "no persons will be evicted from HUD-owned property unless you are certain that the persons evicted are able to move into decent, safe, sanitary and satisfactorily heated housing. Absent such assurances, no occupants will be evicted."[79] A unanimous Massachusetts Supreme Court decision upheld a Cambridge ordinance that gives the city discretion to grant or withhold eviction permits when the purchaser of a condominium wants to evict the current occupant so a new purchaser can move into the unit. The court held that there was a legitimate public interest to be served in government regulation of evictions.[80] To the extent it can be shown that forced displacement imposes severe educational costs on those most in need of a good education, laws might be passed forbidding eviction — in tandem with programs providing short-term financial relief — so that such forced moves could not occur during the school year. A property owner's absolute right to evict tenants is already constrained in a number of other ways, at least in some jurisdictions (e.g., when the eviction is in retaliation for the tenant's assertion of rights, such as having the housing code enforced).

C. Homelessness, Welfare, Child Welfare, and Migrant Family Policies

The few existing federal categorical programs that assist educational stability and educational success for homeless and migrant students should be preserved and expanded, and of course adequately enforced. Information about successful model programs at the state and local levels should be widely disseminated, and replicated all over the country.

In the area of welfare reform, greater awareness of and attention to the classroom turnover problem are warranted. Welfare policies that result in family relocation must be analyzed in light of their unintended negative consequences for education rights: If intergenerational patterns of poverty and welfare dependence are to be ended, adequate education of children is as important a consideration as are issues of parental employment. Timing and necessity of residential relocation in order to meet requirements of or take advantage of opportunities under welfare reform programs need to take place with full appreciation of the associated educational impacts. Federal and state welfare administrators should receive and disseminate materials on the issue of classroom mobility, along with recommendations for policy modifications in light of such understanding. Opportunity for adding this important consideration presents itself during the upcoming Temporary Assistance for Needy Families Program (TANF) reauthorization process. Among the ways in which welfare reform can reduce student mobility are: use of TANF dollars to avoid or postpone evictions and assist housing programs (including using Individual Development Accounts designed to assist families in saving to buy a home); and using TANF funds to assist with after-school tutoring so as to minimize the negative impacts of school change.[51]

Child welfare, in particular foster care, is another area where increased sensitivity to the problem of school/classroom mobility is warranted. While decisions about placing children in foster homes are complex, at least one important consideration, with respect to location and timing, should relate to the impact on school stability. Wherever possible, such placements should avoid the need to change schools, especially within a school year. Again, educational materials and, as appropriate, directives should be disseminated to government and private social workers working in the foster care system.

In the area of migrant families, the U.S. Department of Education must be far more aggressive in ensuring that electronic interstate records transfer systems are put into place. The Department also needs to ensure that its financing formula acknowledges the current geographical distribution of students — who are appearing in many new places — rather than basing allocations on outdated demographics. Finally, the Department needs to ensure, via closer enforcement, that migrant student program funds are spent so as to produce educational benefits most effectively.

D. Needed Research

Clearly, this is an area where additional research is needed.[52] Among the questions we have initially identified are:

- What is the impact of a highly mobile classroom on the stable students in that classroom?
- What is the impact of highly mobile classrooms on teachers?
- What are the ways in which welfare reform impacts classroom mobility?
- What are the ways in which the child welfare/foster care system impacts classroom mobility?
- What financial costs are imposed on school systems as a result of high classroom mobility?
- How does high mobility impact new accountability systems?
- What is the experience of private/parochial schools with classroom mobility?
- How does the Department of Defense deal with classroom mobility in the schools it runs?
- To what degree do the leading education reform proposals — e.g., higher teacher qualifications, smaller schools/classrooms, improved equipment — reduce classroom mobility?
- What litigation possibilities – in the housing area as well as the education area — exist to force needed change: what are the legal theories, with respect to housing policy, school policy, and other rel-

evant areas, that might produce desirable results?

A multipronged approach to addressing high classroom mobility should seek to support family stability and family-school engagement in an integrated and comprehensive manner as well as protect educational rights by instituting shared responsibility for mobile students among schools, school districts, and government at all levels. It is my hope that this article will be a step in the process of increasing awareness of the centrality of the issue of high classroom turnover and beginning to implement changes in housing, school, welfare, homelessness, migrant worker, and foster care policies that reflect the need both to reduce such damaging turnover and to handle it in the least educationally harmful manner when it cannot be avoided.

Endnotes

[1] Chester Hartman (*chartman@prrac.org*) is the President/Executive Director of the Poverty & Race Research Action Council in Washington, D.C. PRRAC is a national public interest organization that networks between the civil rights and anti-poverty communities, and provides support for and dissemination of social science research on the intersections of race and poverty that in turn is designed to support a planned advocacy agenda. This chapter is based largely on the June 2000 PRRAC conference, held at Howard University Law School, "High Student Mobility/Classroom Turnover: How to Address It? How to Reduce It?" The conference was supported by grants from the George Gund Foundation and the Spencer Foundation. Sandra Paik, PRRAC's former Director of Education Programs, contributed material to this chapter, and Roger Rosenthal of the Migrant Legal Action Program and Patricia Julianelle of the National Law Center on Homelessness and Poverty provided helpful consultation.

[2] U.S. General Accounting Office (GAO), *Elementary School Children: Many Change Schools Frequently, Harming Their Education* (Washington, D.C.: GAO 1994) (GAO/HEHS-94-45).

[3] Private/parochial schools are not treated in this chapter, and there appears to be little information about classroom turnover in these systems. Also omitted from this discussion are public schools run by the Department of Defense and the Bureau of Indian Affairs; how the former in particular, where considerable school mobility is essentially built into the assignment rotation system, handles mobility would make an interesting, likely useful inquiry. For a recent general discussion of these systems, *see* U.S. General Accounting Office, "BIA and DOD Schools: Student Achievement and Other Characteristics Often Differ from Public Schools'" (Sept. 28, 2002) (GAO-01-934).

[4] "A Study of Student Mobility in Texas Schools," Statewide Texas Educational Progress Study, Report No. 3 (Austin, TX: Texas Education Agency Mar. 1997) ("Mobility in Texas Schools").

[5] Del Stover, "Schools Grapple with High Mobility Rates," *School Board News* (June 13, 2000) ("Schools Grapple").

[6] Jim Carnes, with Linda Linssen, "Musical Chairs: Booming Las Vegas Schools Struggle to Make a Place for Everyone," *Teaching Tolerance*, at 56-61 (Fall 1997) ("Carnes and Linssen").

[7] Russell W. Rumberger *et al.*, *The Educational Consequences of Mobility for California Students and Schools*, at 23 (Berkeley, CA: Policy Analysis for California Education 1999) ("*Consequences of Mobility*").

[8] *Id.* at 28.

[9] David Kerbow, "Patterns of Urban Student Mobility and Local School Reform," 2 *Journal of Education for Students Placed at Risk* 150 (1996) ("Patterns").

[10] The only such article we have found appeared in *The Progressive* (Ruth Conniff, "Bounc-

ing from School to School: The Housing Crisis Disrupts the Classroom," *The Progressive*, at 21-25 (Nov. 1998)). Useful bibliographies of the academic literature can be found in Mobility in Texas Schools; Patterns; and Karl L. Alexander, Doris R. Entwisle and Susan L. Dauber, "Children in Motion: School Transfers and Elementary School Performance," 90 *Journal of Educational Research* 3-12 (1996). The National Center for Homeless Education has available on its website (<*www.serve.org/nche*>) an annotated bibliography and article reprints.

[11] Kerbow notes in Patterns, "Without a certain level of stability, it is unclear how school-based educational programs, no matter how innovative, could successfully develop and show long-term impact."

[12] David Kerbow, *Pervasive Student Mobility: A Moving Target for School Improvement*, at iv (Chicago: Center for School Improvement) ("*Pervasive Student Mobility*"); and Patterns.

[13] *Cited in* Mobility in Texas Schools at 9.

[14] *A Report from The Kids Mobility Project*, at 6, 7 (Minneapolis: Family Housing Fund Mar. 1998) ("Kids Mobility Project").

[15] Russell W. Rumberger *et al.*, "The Educational Consequences of Mobility for California Students and Schools," Policy Brief (Berkeley: Policy Analysis for California Education), at 2 (May 1999) ("Rumberger Policy Brief"). Rumberger and his colleagues, in a separate publication, deal with the specific issues facing Latino students; *see* Russell W. Rumberger *et al.*, "The Hazards of Changing Schools for California Latino Adolescents," *CPS Brief* (Oct. 1998).

[16] Patterns.

[17] James E. Bruno and Jo Ann Isken, "Inter- and Intra-school Site Student Transiency: Practical and Theoretical Implications for Instructional Continuity," 29 *Journal of Research and Development in Education* 247.

[18] PRRAC, in conjunction with Legal Services of New York, is currently engaged in a project to assemble available eviction data — magnitude, incidence, causes, results — and propose a national eviction tracking database, to appear initially as a forthcoming article in *Housing Policy Debate* by Chester Hartman and David Robinson.

[19] Rumberger Policy Brief reports that "Our statistical analysis of school test scores found that average student test scores for non-mobile students are significantly lower in high schools with high student mobility rates," a phenomenon they attribute to a "chaos" factor.

[20] Bruno and Isken list other school site impacts caused by transient students, as reported by teachers: added clerical time processing paperwork and finding prior records of arriving students, additional testing and placement time, remediation needs, counseling students, teachers, and families.

[21] David Wood *et al.*, "Impact of Family Relocation on Children's Growth, Development, School Function and Behavior," 270 *Journal of the American Medical Association* 1334-1338 (1993) ("Impact of Family Relocation").

[22] Patterns.

[23] *Consequences of Mobility* at 63.

[24] Kids Mobility Project.

[25] An unusual form of residential instability was reported by an elementary school principal in Las Vegas, where "about two miles from The Strip . . . there are new complexes all over the area. They all offer special 'one month free' move-in rates, so many of our families pick up and move every few months to get the deals." Carnes and Linssen at 56. Mobility in Texas Schools at 8 makes a similar observation: "Some poor families move constantly in order to take advantage of 'move-in specials' at apartment complexes in the area. The students may be at a given school for only three of four months, until they move to the next apartment with a re-

duced rent."

[26] National Law Center on Homelessness and Poverty, *Separate and Unequal: A Report on Educational Barriers for Homeless Children and Youth* (Jan. 2000) ("NLCHP Report").

[27] *See* Michael Janofsky, "Debate Weighs Merits of Schools for Homeless," *The New York Times*, Sept. 19, 2001 ("Debate Weighs Merits").

[28] *See* Deborah Stein, "Does Welfare Reform Create, Exacerbate or Ameliorate Student Mobility and Success?," paper prepared for Children's Defense Fund Annual Conference, Apr. 18-21, 2001 ("Does Welfare Reform Create"); "A Multi Dimensional Challenge: How Do Schools, Education Policies, Housing Policies, Child Welfare Policies, and Welfare Reform Create or Exacerbate Mobility?," paper prepared for PRRAC's June 2000 conference mentioned in note 1 ("Multi Dimensional Challenge").

[29] Kristin Anderson Moore, Sharon Vandivere, and Jennifer Ehrle, "Turbulence and Child Well-Being," *in Assessing the New Federalism*, at 3 (Washington, D.C.: The Urban Institute June 2000) ("Moore *et al.*"). *See generally*, Children's Defense Fund, *Families Struggling to Make It in the Workforce: A Post Welfare Report* (2000).

[30] Moore *et al.*

[31] Does Welfare Reform Create.

[32] Angela M. Branz-Spall and Roger Rosenthal, "What the Title I Migrant Education Program Needs in 2001," *Title I Monitor*, at 1 (Feb. 2001).

[33] National Association of State Directors of Migrant Education (NASDME) and National Association of Migrant Educators, "Giving Migrant Students an Opportunity to Learn" (Sunnyside, WA) (NASDMLE Report).

[34] "In the District [of Columbia], thousands of children have spent four to five years bouncing among foster and institutional homes before they find a permanent home" – and so they are also bouncing among many schools at arbitrary times within the school year. Sari Horwitz and Scott Higham, "Record Numbers of D.C. Children Go to Foster Care," *The Washington Post*, Feb. 28, 2000, at A1. Should there be a return to some improved form of "children's homes," as possibly may be the case, this would have important implications for the education enterprise and the incidence of classroom turnover for these students. *See* Jena Hopfensperger, "Children's Homes: An Old Idea Stirs" (*Minneapolis Star Tribune*, Jan. 27, 2002, at B1), which notes that, according to Prof. Richard Barth of the University of North Carolina, a national expert on children in out-of-home care, "proposals to create new institutions [to remedy failures in the foster care system] are surfacing not just in Minnesota, but nationwide."

[35] Patterns at 154.

[36] *Consequences of Mobility* at 71-78.

[37] Bruno and Isken at 241.

[38] Impact of Family Relocation at 1337.

[39] *Consequences of Mobility* at 26.

[40] Patterns.

[41] *Id.* at 158-59.

[42] Schools Grapple.

[43] Rumberger Policy Brief at 3.

[44] *Consequences of Mobility* at 60.

[45] *Id.* at 33.

[46] NASDME Report.

[47] *See, e.g.*, Kids Mobility Project at 7-8.

[48] *Consequences of Mobility* at 59.

[49] Bruno and Isken.

[50] *Id.*

[51] *See* Debate Weighs Merits; NLCHP Report.

[52] Details and further relevant provisions are to be found in section 722(e) and 722(g) of the McKinney-Vento Act and section 1112(a) and 1112(b) of the new ESEA. For further details on the new McKinney-Vento and ESEA legislation, see the National Coalition for the Homeless website: *<www.nationalhomeless.org>*.

[53] See Ill. Ann. Stat. ch. 105 S 45/1-15(2) (WESTLAW 2000): "[T]he school district of origin and school district in which the homeless child is living shall meet to apportion the responsibility and costs for providing the child with transportation to and from the school of origin. If the school districts are unable to agree, the responsibility and costs for transportation shall be shared equally."

[54] See Victoria Independent School District, "KIDZ Connection: One Child, One School, One Year."

[55] *<http://ngsmigrant.com>*, 800-365-1873

[56] The contact number for Project SMART is 800-292-7006.

[57] ESTRELLA contacts are 888-637-0555, *info@estrella.org*.

[58] Information about the Texas Migrant Interstate Program is available from *tyanez@hiline.net*, 800-292-7006.

[59] The contact number for the Hotline is 800-234-8848.

[60] The Binational Migrant Education Program is reachable at 512-245-1365 (Frank Contreras, Director).

[61] Additional information on migrant education issues is available from the National Association of State Directors of Migrant Education, *<www.nasdme.org>*, and the Migrant Legal Action Program, *hn1645@handsnet.org*.

[62] *The Principal Advisor*, Vol. 1, No. 2, at 1 (Mar. 2000).

[63] Kids Mobility Project.

[64] Lynn G. Beck, Cindy C. Kratzer, and Jo Ann Isken, "Caring for Transient Students in One Urban Elementary School," 3 *Journal for a Just and Caring Education* 343-369 (1997). *See also* Norma Frank, *Sailing New Seas: Helping Students in Grades 1-4 Cope with Moving* (Warminster, PA: mar*co products 1996), a detailed handbook of useful ideas for students, counselors, teachers, and administrators.

[65] Carnes and Linssen.

[66] The National Trust for Historic Preservation's "Historic Neighborhood Schools Initiative" deals with this issue; *see* Constance E. Beaumont, with Elizabeth Pianca, *Historic Neighborhood Schools in the Age of Sprawl: Why Johnny Can't Walk to School* (Nov. 2000).

[67] For a recent account of one such controversy in a rapidly growing Maryland county, *see* Nurith C. Aizenman, "Howard School Shuffle Creating a Fury," *The Washington Post*, Jan. 13, 2002, at C1. One 14-year-old student cited in this account has lived in the same home since kindergarten, yet will have attended six schools in seven years if the proposed redistricting plan is approved, the combined result of boundary changes and normal progression from elementary to high school.

[68] *See, for example,* Robert C. Johnson, "Dropout Studies Target 'Pockets of Problems,'" *Education Week*, at 3 (Jan. 14, 2001); Michael A. Fletcher, "Progress on Dropout Rate Stalls," *The Washington Post*, Mar. 3, 2001, at A1; Emily Wax, "Rethinking Suspended Education," *The Washington Post*, Jan. 12, 2002, at B1.

[69] Mobility in Texas Schools reports that "on average, student turnover rates among *Low-*

performing schools were twice as high as those among *Exemplary* schools."

[70] C. Jack Tucker, Jonathan Marx, and Larry Long, "'Moving On': Residential Mobility and Children's School Lives," 71 *Sociology of Education* 125 (1998).

[71] For a detailed presentation of such a program, *see* Institute for Policy Studies Working Group on Housing, *The Right to Housing: A Blueprint for Housing the Nation* (1989).

[72] *See* National Low Income Housing Coalition, "Out of Reach 2001: America's Growing Wage-Rent Disparity" (2001); Joint Center for Housing Studies of Harvard University, "The State of the Nation's Housing 2001" (2001).

[73] *See* Michael S. FitzPatrick, "A Disaster in Every Generation: An Analysis of HOPE VI: HUD's New Big Budget Development Plan," Note, VII *Georgetown Journal on Poverty Law & Policy* 421-448 (2000).

[74] *See* Rick Cohen, "The Role of Community Development Corporations in Implementing a Right to Housing," *in Housing: Foundation of a New Social Agenda* (Rachel G. Bratt, Chester Hartman, and Michael E. Stone eds., Philadelphia: Temple University Press, forthcoming).

[75] Chester Hartman, "The Right to Stay Put," *in Land Reform: American Style* (C. Geisler and F. Popper eds., Totowa, NJ: Rowman and Allanheld 1984); *reprinted in* Chester Hartman, *Between Eminence and Notoriety: Four Decades of Radical Urban Planning* (New Brunswick, NJ: Rutgers Center for Urban Policy Research 2002).

[76] For a compendium of such forms of assistance, see the handbook "Displacement: How to Fight It," by Chester Hartman, Dennis Keating, and Richard LeGates (Berkeley, CA: National Housing Law Project 1982).

[77] For details on such programs, see the forthcoming *Housing Policy Debate* article referred to in note 18.

[78] "Protections for Military Renter Households Under the Soldiers' and Sailors' Relief Act," *Housing Law Bulletin*, at 262-263 (Nov./Dec. 2001).

[79] National Housing Law Project, VII *Law Project Bulletin* 1 (Jan./Feb. 1977)

[80] *Flynn v. Cambridge*, 418 N.E. 2d 335 (1981).

[81] *See* Multi Dimensional Challenge.

[82] Under PRRAC's research/advocacy grants program, a number of projects will be commissioned to provide this needed information.

Chapter 17

Limited English Proficient Students and High-Stakes Accountability Systems

by Jorge Ruiz de Velasco and Michael Fix[1]

Introduction

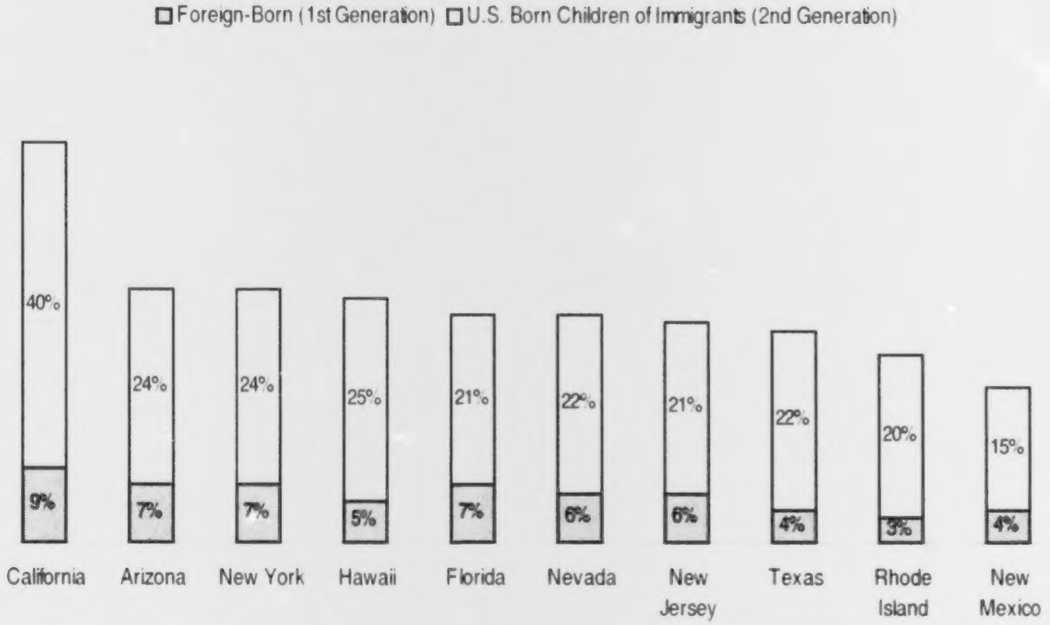
In 1994 Congress required all states to implement comprehensive accountability systems for schools receiving federal funds under the Elementary and Secondary Education Act (ESEA). This new federal requirement responded to civil rights advocates' concerns that schools serving large numbers of poor, minority, and limited English proficient (LEP) students set lower standards for their education and thus ratified lower expectations for their performance.[2] These changes in the ESEA made a dramatic break with past practice by requiring states to replace minimum standards for poor and academically disadvantaged children with challenging standards for all students. New accountability systems were to be based on state-established content standards for reading and math, include assessments aligned with those standards, and would require that states hold all students to the same performance standards.

In 2001, Congress again reauthorized the ESEA when it passed the No Child Left Behind Act (NCLB).[3] The NCLB mandates annual testing of every child in grades three to eight and strengthens requirements that states hold schools and districts accountable for student performance, including, specifically, minority students, poor students, and those with limited proficiency in English.

Studies by the Citizens' Commission on Civil Rights (1999 and 2001), however, have shown widespread noncompliance by states with the 1994 law and a reluctance by both the Clinton and Bush Administrations to enforce its provisions regarding the appropriate assessment of LEP students and consideration of their performance in Title I accountability systems.[4] Moreover, most states have failed to provide the resources needed by schools to effectively educate LEP students to high standards. Yet, despite these failures, some states have decided to use their assessments to visit high-stakes consequences on students (e.g., relying on test scores to determine student promotion and graduation). Such uses of tests, especially where the curriculum and instruction are not aligned with standards, can violate both accepted professional guidelines and federal civil rights law.

The bar for achievement is being raised in every state. Yet, there is now a growing body of evidence that the inclusion of limited-English speaking students into one-size-fits-all state accountability systems is proving problematic. Case study and early outcome data suggest that many schools continue to lack the capacity to help LEP students meet new standards. Wide language, literacy, and skill diversity among LEP students as well as continuing knowledge gaps within the education profession about how to best serve LEP students often leave teachers unprepared to

Figure 1:
Percent of Children Who are Children of Immigrants, Top 10 States: 1996-1999



Source: Urban Institute tabulations of edited 1996-1999 March Current Population Survey (CPS)

help their students meet the same standards applied to all students. These challenges are increasingly complicated as the number of LEP students in U.S. schools grows and their families settle in communities with little experience or infrastructure to work effectively with language minority children. The problem is perhaps most daunting in secondary schools, many of which are failing to provide LEP students with language development services needed to move into mainstream instruction.

These developments have important implications for federal policies intended to support the education of LEP students. Rather than block granting most federal LEP funds directly to states on a formula basis (as the recently reauthorized ESEA does), federal programs might better serve LEP students by targeting federal assistance to a discrete but critical set of concerns that remain unaddressed. A carefully targeted approach can draw attention to the unmet needs of LEP youth and build local capacity to meet those needs.

I. Selected National Trends

To set our discussion in context, we begin by noting several powerful demographic trends that bear on the nation's schools. According to the Census, one in five children under 18 is the child of an immigrant – a

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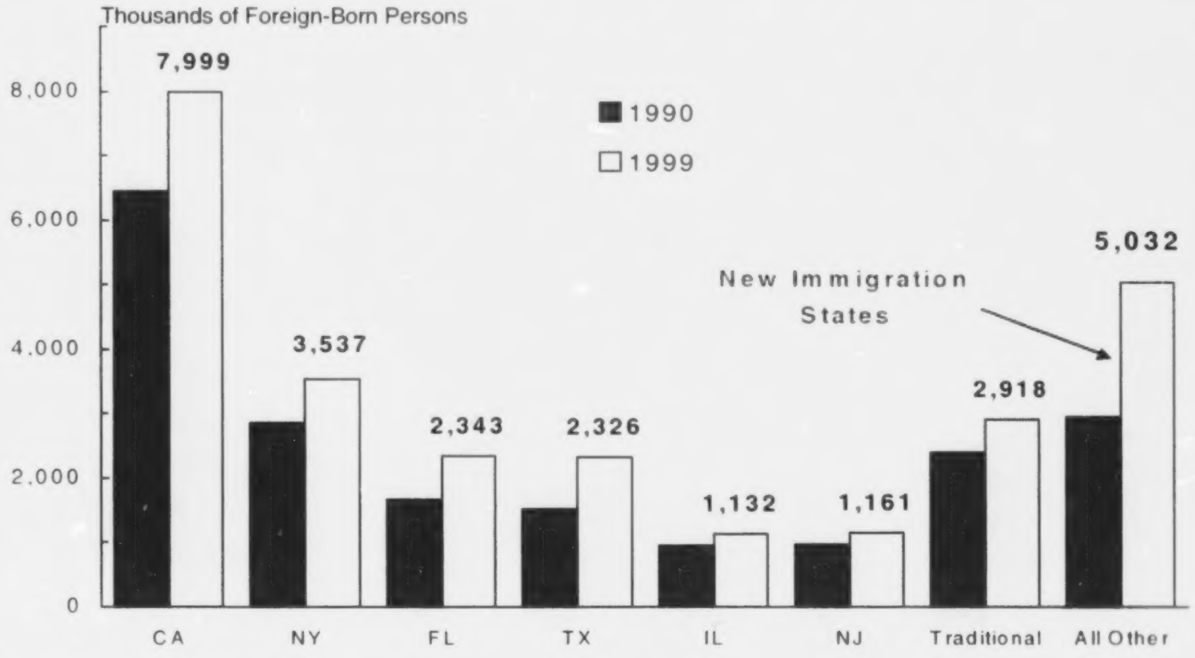
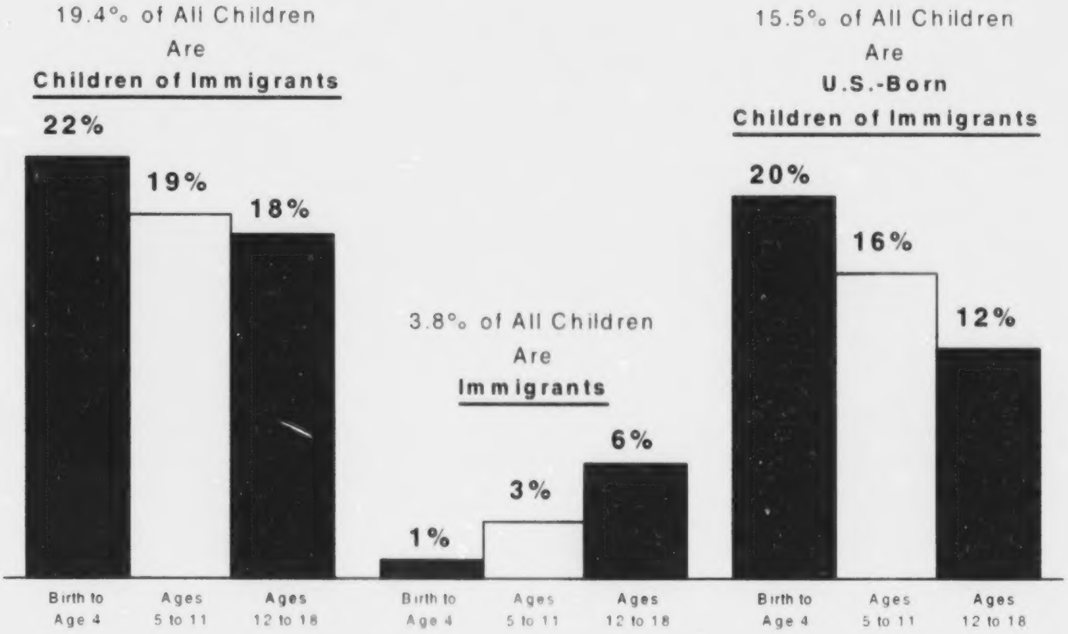
Figure 2:
Foreign-Born Population for Selected States and Areas



Source: 1990 Census and March 1999 CPS

share that has more than tripled within a generation and that will grow in the coming years (*Figure 3*). Over half of all children in New York City and 60% of all children in Los Angeles are the children of immigrants. Rapid growth has led to population dispersal in the nation as the communities with large shares of immigrant children are no longer confined to a few gateway cities or states. For example, during the 1990s the immigrant population grew twice as fast (61 versus 31%) in nontraditional receiving states as it did in the six states that receive the largest numbers of newcomers (*Figure 2*). School districts in these states are likely to have few staff who are experienced in educating immigrant children. Moreover the impact aid they receive from the federal government is quite limited. Both challenges also confront communities that have not been destinations of immigrant flows in high immigrant states. Our research reveals that foreign born immigrant children represent a larger share of the total high school population (5.7%) than of the total elementary school population (3.5%). Recently arrived foreign born immigrants (i.e., those in the United States less than five years) also represent a larger share of the secondary than elementary school populations (2.7 versus 2.0%). These recently arrived students, in particular, are likely to require additional language and other services. Despite the fact that recently arrived immigrant children represent a

Figure 3:
Percentage of Children Who Are Children of Immigrants,
By Age and Generation: 1996-1999



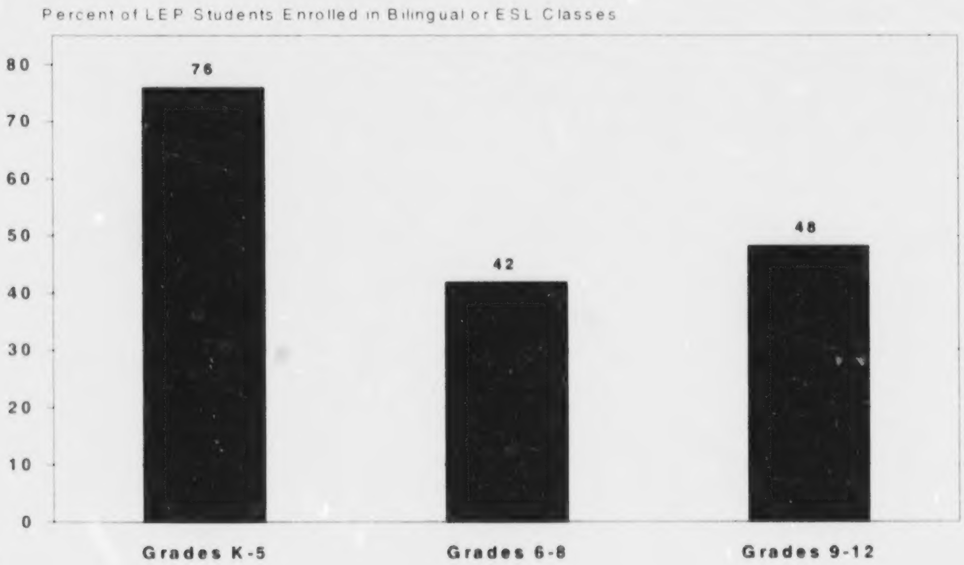
Source: Urban Institute tabulations of edited 1996-1999 March CPS

larger share of middle and high school than elementary school students, LEP secondary school students are less likely to be enrolled in English-as-a-Second-Language (ESL) or bilingual classes than LEP elementary school students (*Figure 4*). More recent data released by the U.S. Department of Education's Office for Civil Rights indicates that secondary schools are having difficulty providing large numbers of LEP students with *any* special instructional or support services tailored to meet their special language development needs (*Figure 5*). One set of explanations for these disparities is that ESEA funds flow disproportionately to elementary schools and that secondary schools have generally been slower to respond to reform pressures than elementary schools.[5]

High Levels of LEP Segregation in Schools

One particularly troubling trend among children in immigrant families is their segregation within schools. One half of limited English proficient children (K-12) attend schools where a third or more of their fellow students also have difficulty speaking English (*Figure 6*). (By way of contrast only 2% of non-LEP students attend such schools.) This means that immigrant children are going to schools that are not just ethnically and economically segregated, but also linguistically isolated.

Figure 4:
Bilingual/ESL Enrollment by Grade Level



Source: 1993 Schools and Staffing Survey (Student Surveys)

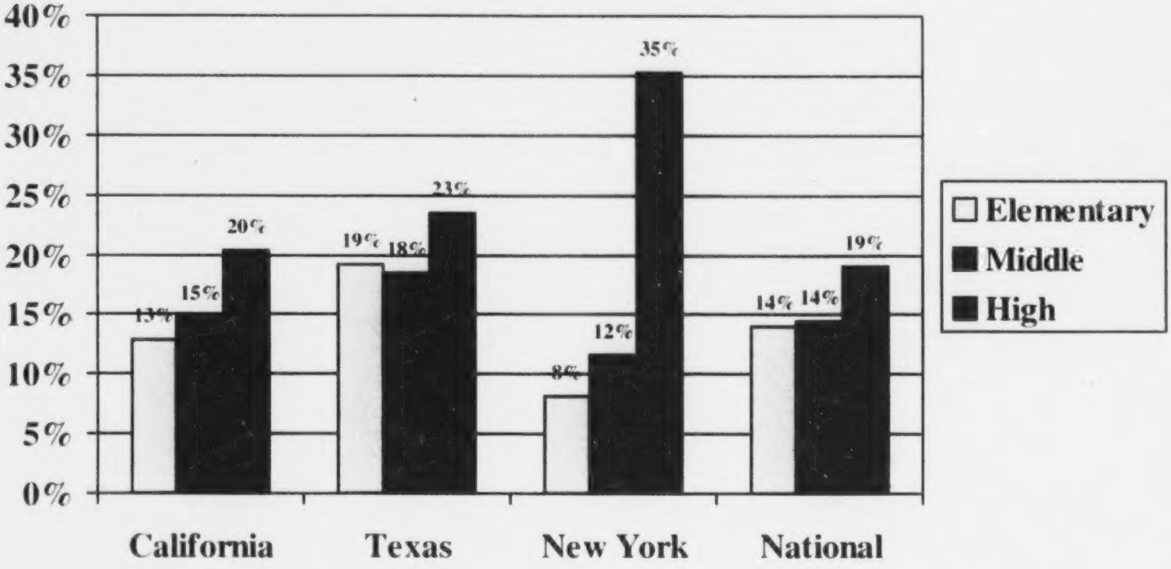
II. LEP Students and Standards-Based Accountability Systems

Many proponents of standards-based reforms envisioned that before implementing new curriculum and student performance standards, schools would have the support they need to meet new demands. At a minimum, this meant an adequate supply of high-quality textbooks, technological software, and other instructional materials that would promote learning to the new standards. Some advocates of standards-based reforms also assumed that pre-service and in-service professional development systems would serve the new curriculum standards.

Unfortunately for LEP students and their teachers, many states have put standards and high-stakes assessments in place ahead of the support and teacher preparation that are prerequisite for their success. To the contrary, many state accountability systems make two important assumptions about the classroom: first, that the basic elements for academic success (i.e., educators with appropriate resources and know-how) already exist in the classroom;[6] and second, that students are ready to perform at or near the desired performance level.[7]

With these assumptions as a point of departure, student test scores become in many states an exclusive measure of performance that drives rewards and penalties for students and school staff. All that is theoreti-

Figure 5:
Proportion of Unserved LEP Students by State and School Type, 1998-1999



Source: Fall 1998 Elementary & Secondary School Civil Rights Compliance Report, Office for Civil Rights, U.S. Department of Education (excludes schools where students could not be disaggregated by grade spans K-6, 7-8, 9-12, about 4.5% of schools).

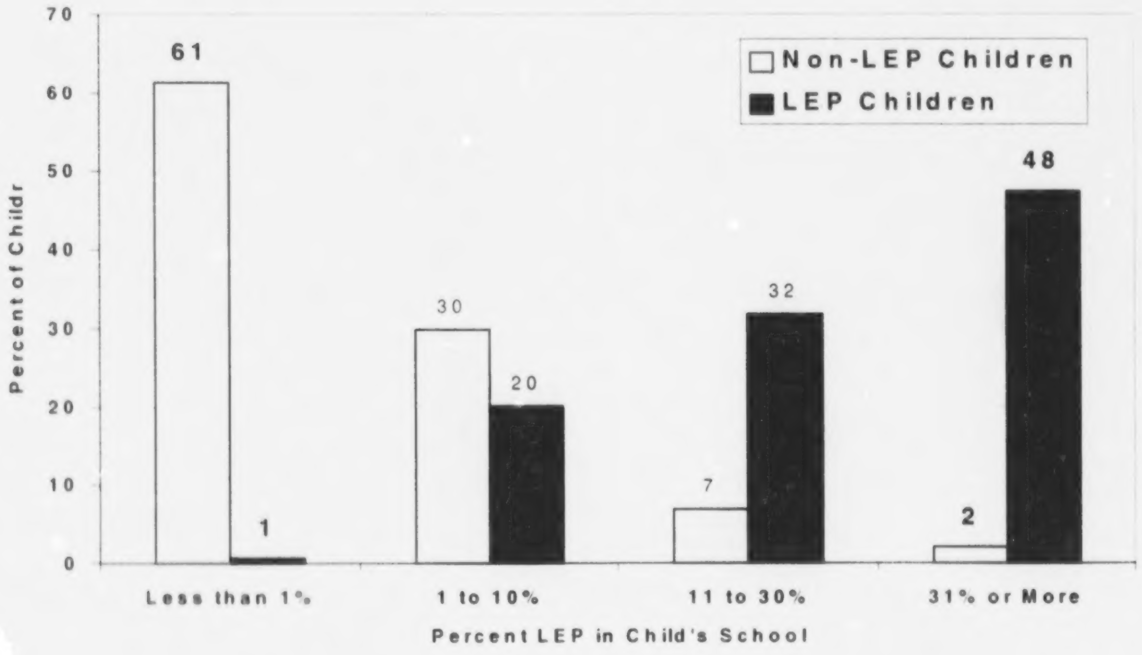
cally needed for success is for administrators, teachers, and students to be given clear signals about what is expected (performance standards) and the right set of incentives (accountability systems and high-stakes assessments) to get them to focus on production (meeting the standards).

There is some emergent evidence that however applicable these assumptions are to the typical classroom, they do not hold for immigrant and other language minority students and the teachers who work directly with them. In the sections that follow we examine why the inclusion of LEP students in effective accountability systems is a challenge and why it will likely remain so in the absence of better targeted state and federal support to schools serving large numbers of LEP students.[8]

A. Demographic Diversity: New Faces, New Challenges

One of the biggest challenges schools have in fitting LEP students into accountability regimes derives from their wide diversity and needs. Data from the 2000 Census are only now beginning to bring into sharp relief a basic fact about LEP students that teachers and administrators have known for a while: English language learners vary considerably with respect to the number of languages they speak, the level of prior schooling in their native languages, the level of

Figure 6:
Comparison of Schools with Limited English Proficient Students



Source: Schools and Staffing Surveys (School Surveys, 1993-94)

parent education, and the nature of home literacy practices (e.g., whether students are read to at home) as well as in the degree to which they are linguistically isolated from English learning outside the classroom setting. All of these factors have been found to bear on classroom learning and may require different kinds of interventions, teaching strategies, and curricula. Indeed, some educators have questioned whether the level of diversity found among LEP immigrants might require that schools move away from offering one basic language development program to an approach similar to special education, in which schools develop an individualized education plan for each student. Some states, including Texas, have taken some steps in this direction.

Recent studies of immigrant secondary education programs have identified two LEP student subpopulations as being of special concern. One is the set of immigrant children who arrive as teenagers. The time available for these late-arriving secondary students to master a new language and pass subjects required for high school graduation is limited. As a result, language and content instruction must be offered simultaneously rather than sequentially. Our research reveals that little is known about how best to help late-arriving teens master language and content while also meeting new state standards.[9]

Another subgroup that concerns classroom teachers is the growing number of underschooled newcomers who must overcome critical literacy gaps and the effects of interrupted schooling in their home countries. Schools rarely collect data on the prior schooling of immigrant students, so their precise number in U.S. schools is not known. One estimate indicates that 20% of all LEP students at the high school level and 12% of LEP students in middle schools have missed two or more years of schooling since age six.[10] The basic predicament for schools is that underschooled LEP students most often arrive with a weak foundation for learning a second language and have difficulty working at age-appropriate levels in required subjects even when taught in their native or primary languages.[11] Moreover, because most ESL and bilingual education programs for secondary school youth assume some native language literacy as a foundation for second-language learning, they are not designed to develop the basic literacy that children would normally have acquired in elementary schools.[12]

B. Continuing Low System Capacity

Another challenge to LEP student education is that even the best of schools often lack the capacity to meet student needs. Here the problem is not just about the need for *more* resources. The problem encompasses a critical need for *new*, and as yet undiscovered, resources.

1. A Lack of Reliable Assessment Instruments

Chief among these capacity issues is a long-standing lack of reliable assessment instruments available for testing LEP students' content knowledge (e.g., mathematics, social studies, science) in Spanish and other native languages. Although some states have produced Spanish-language versions of the state content tests (e.g., Texas), others have determined that there is no appropriate way to translate state achievement tests into other languages and some (e.g., Illinois) specifically prohibit local officials from doing so.[13] The lack of reliable content area assessments or information on appropriate assessment accommodations for LEP students is a challenge in all states developing standards-based accountability systems.

2. A Long-Term Shortage of Trained Teachers

Critical shortages of language development and other specially trained staff place special burdens on schools as they struggle to meet the needs of a growing number of LEP students. Consider these data from the last national Schools and Staffing Survey: only 30% of public school teachers instructing limited-English students nationwide reported receiving any special training for working with these students. Moreover, 27% of all schools with bilingual/ESL staff vacancies — and 33% in central city school districts — reported finding them "difficult" or "impossible" to fill.[14]

The long-term shortage of new teachers specially trained to work with LEP students underscores the importance of training *veteran* teachers to work more effectively with new populations of LEP immigrants. This imperative is especially strong in secondary schools, where LEP students are often in mainstream subject classes for at least part of their school day. Yet, training around LEP issues (e.g., language acquisition, LEP assessment, and multicultural awareness) is often focused on language development teachers while training for mainstream subject teachers and administrators lags.[15]

C. Persistent Professional Uncertainty over LEP Curriculum and Instruction

While there appear to be a number of effective strategies for helping LEP students develop basic oral English speaking and comprehension skills, a review by the National Academy of Science (NAS) suggests that professional knowledge on how to help LEP students develop *academic* English literacy remains at an early stage of development. This problem is particularly acute in secondary schools where learning in mainstream content classes requires background knowledge and advanced literacy skills (both linguistic and cultural) that second-language learners may not possess.[16] In the typical social science class, for example, students must be able to construct arguments and discuss alternative solutions to social problems in English. In mathematics, students must work with English texts containing vocabulary specific to math (e.g., *integer, algebraic*), as well as everyday words that have different meanings in mathematics (e.g., *table, irrational*). The predicament for many LEP students is that this level of academic English may take 4 to 7 years to acquire under the best of circumstances,[17] while the window of time students have to master the subjects required for graduation is limited.[18]

The NAS study also identified continuing knowledge gaps respecting the way that student age, intelligence, and attitudes mediate language learning. Much also remains unknown about the specific relationship between the social and linguistic environments of schools and the linguistic attainments of students.[19] Immigrant residential patterns and ESL bilingual programming may, for example, combine to result in schools where LEP immigrant students are concentrated with other language minority students. Although research in this area remains thin, studies have found that immigrant LEPs may encounter difficulties in language and subject matter learning because of limited exposure to English speakers in their home and peer-group settings. Such nonclassroom contact has been found to accelerate language and subject learning by exposing LEP students to novel word meanings and standard/academic discourse styles that are rewarded in classroom work.[20]

D. School Organization Issues That Impede LEP Students in Secondary Schools

The organization of work and time in the typical secondary school is often incompatible with the needs of English language learners and tends to isolate them and their language development teachers from the mainstream school program.[21] These concerns are all the more important as LEP students are expected to meet the same content performance standards as all other students in order to graduate.

1. Organization of Secondary School Staff

The organization of secondary school staff into subject or functional departments (e.g., English and science departments or special education and ESL departments) often has problematic consequences for LEP students and their language development teachers. Organizational issues arise because preparing LEP students to participate in mainstream classrooms is viewed as a special activity outside the "normal" functions of the secondary school.[22]

The organization of secondary schools into departments based on subject matter often leads to the exclusion of ESL/bilingual teachers from functions, such as schoolwide curriculum planning and standards development that often occur within the regular academic departments. This may be especially true in high schools where larger student enrollments and wider grade spans compel greater specialization among teachers.

In one study, departmentalization was found to encourage mainstream subject teachers to believe that addressing the language development needs of their LEP students is the responsibility of other school staff or departments. This belief is often reinforced by the fact that school administrators often do not support training for mainstream teachers that is specifically designed to help them incorporate language development strategies into their math, science, or history classes. Core subject teachers also reported that their lack of knowledge about LEP students' needs often led them to have low expectations of their performance.[23]

Ensuring effective access to the full range of a school's programs (e.g., libraries, computers, counseling, and health services) requires that key staff other than teachers be aware of LEP/immigrant student needs. Yet, principals, counselors, librarians, and other support staff are rarely trained to work with LEP youth. As a result, ESL and bilingual teachers often assume duties normally handled by administrative and support staff. ESL teachers in high schools are often charged with conducting library orientations, computer classes, counseling sessions, and handling discipline conferences with parents. LEP students in such schools have fewer adults who are specifically charged with their education.

2. Organization of Time in Secondary Schools

Teachers in schools with large numbers of language minority students often report that the typical school schedule (50-minute time blocks) and calendar (180 school days) are too discontinuous to promote the kind of sustained, interactive, and comprehensible instruction LEP secondary students need. Teachers cite two critical needs that go unmet when these students and their teachers confront an inflexible schedule.

First, teen LEP students need to spend more time on all tasks that require English language proficiency in order to master the content required for graduation in the short time available. Accomplishing this often requires access to extended day programs, specially designed summer school, and afterschool tutoring. But such extended programming requires district or state-level support that is frequently unavailable.

Second, teachers who work closely with LEP students need to devote more time to planning and collaboration when facing greater skill diversity in their classrooms. Yet the typical teaching schedule — 5 classes per day, 150 students, and a single 50-minute planning period — makes it exceedingly difficult for teachers to prepare for students with special needs, give struggling students individualized attention, and collaborate with other teachers. The complex task of teaching students at differing levels of language and literacy development, coupled with the limited body of professional knowledge about effective teaching strategies, make working in isolation an insuperable challenge. Collaboration *among* ESL/bilingual teachers is important because it allows them to learn the approaches that other teachers are taking with LEP youth. And collaboration *between* language development and mainstream subject teachers is essential for teachers to develop schoolwide strategies for helping LEP students make successful transitions to mainstream instruction. This collaboration requires flexible scheduling allowing for common planning periods and opportunities for team teaching that are too often not supported in secondary schools.

E. Early Warning Signs

1. Increasing Fail and Dropout Rates in the Wake of Standards-Based Reform

As states implement new performance standards some are finding troubling signs that reform efforts are not translating into improved outcomes for all students. This is particularly so where states attach consequences, such as promotion or graduation eligibility, to performance on state assessments. In Texas, for example, the Texas Education Agency has reported that only 20% of LEP tenth graders in the state met minimum qualifications on all three of the exit-level tests (reading, writing and math) required for graduation.[24] The other 80% will face steep challenges as they have only 2 years to master the English language and content skills required for a high school diploma. These numbers are troubling because recent studies confirm that low performing teens are the most likely to drop out of school absent special intervention by their teachers and schools.[25] For example, despite increases over time in the average performance of black and Latino children on the state assessment, there is also evidence that high school dropout rates in Texas have increased for black and Latino students as a result of state implementation of a high-stakes exit test for tenth graders.[26]

The relationship between higher standards and dropout rates is not hard to understand. Researchers have found that early disaffection with school programs that fail to meet their needs and subsequent poor school performance cause students and their families to look on early labor market entry as a rational alternative to continued schooling.[27] While some work during high school may have positive effects on student outcomes,[28] it has also been found that students who work intensely at paid jobs tend to have lower grades and to dropout.[29] Thus, raising graduation standards (without first ensuring that students have the time and support they need to meet those standards) significantly changes short-term calculations of the relative payoffs between schooling and early entry to the labor market. The push to leave school before graduating is particularly acute among teen LEPs, who are often farther behind than others academically. They are also pronounced among undocumented students, whose path to postsecondary education is effectively blocked by limited access to financial aid and whose eligibility for higher paying jobs in the postsecondary job market is effectively barred by law.

Given these circumstances, what can federal policymakers do to promote accountability for student outcomes while creating reasonable and positive incentives for improving those outcomes?

III. Potential Strategies and Policy Choices — The Federal Role in Helping State and Local Educators Respond to the Needs of Language Minority Students

The exclusion of LEP immigrant youth from standards-based accountability systems threatens to widen performance differences between LEP students and others. At the same time, applying a one-size-fits-all accountability system to an LEP population in schools with low capacity to meet their needs could lead to equally undesirable consequences. These include increased grade retention and drop-out rates among language minority students and low morale among their teachers and administrators. The challenge is to extend accountability systems to LEP students in ways that realistically take into account the existing capacity among educators at the school level.

Some considerations follow:

A. Taking a Cautious Approach to "High-Stakes" Consequences with Respect to LEP Students

As noted earlier, some states (e.g., Texas and New York) have begun to attach high-stakes consequences (i.e., student promotion or graduation) to student outcomes as measured by performance on state-administered tests. In others, teacher and/or administrator pay and promotion are linked to school-level test outcomes. The central question is whether it is appropriate to impose such high-stakes consequences on individual LEP students and the school-level staff who teach them given the capacity issues outlined earlier in this essay.[10]

B. Rethinking the Role of the Federal Office of Bilingual Education and Minority Language Affairs

The U.S. Department of Education's Office of Bilingual Education and Language Minority Affairs (OBEMLA) has been the federal government's lead agency in developing policy and supporting state and local efforts to meet LEP student needs. In the past two decades the lion's share of OBEMLA's targeted grants have been focused on broad capacity building efforts to help individual schools or school districts mount comprehensive language development programs. An examination of OBEMLA's most recent budgets indicates that roughly 60% of its funds go to support "general instructional services" for LEP students.[11] The newly reauthorized ESEA expands this broad capacity-building role by essentially block-granting most OBEMLA funds directly to states on a formula basis.[12]

Our current assessment of LEP education suggests that the broad capacity-building function advanced by the new administration should instead be funded through the ESEA's much larger Title I program (funded at nearly the $8 billion level in FY2001). We believe the move to broaden the uses of OBEMLA funds will serve only to further blunt the potential effectiveness of federal leadership on a more discrete but critical set of concerns that remain persistently unaddressed at the state and local levels. The small amount of OBEMLA-administered funds (about $310 million in FY2001)[13] should instead be more carefully targeted to critical unmet needs: (1) key research issues; (2) demonstration programs that might advance our understanding of promising new curricula, assessments, and innovative approaches; and (3) professional development programs that prepare new and veteran teachers to work with language minority youth. These priorities are outlined below in turn.

1. The Research Needs

a. Expanding the Collection and Effective Use of LEP Student Data

Data-driven reform can be the lynchpin of a sound accountability system. At the school level, data on how recently students have immigrated and on the level of previous education in the home country have been found to be helpful to teachers, although they are not often collected by schools. These data might also help school-level staff identify subpopulations of students (e.g., underschooled newcomers) who might have literacy needs that are not squarely met by standard ESL/Bilingual programming.

Currently, few states collect school-level data on the number of LEP students who are retained in grade (a factor that has been found to correlate with dropping out) nor do districts routinely collect and report school-level data on how many LEP students are served in support programs other than ESL/Bilingual (e.g., number also served in Title I or Special Education programs). This type of data would help state and district level educators measure local program effectiveness and identify unmet needs.

b. Helping States Develop Assessment Instruments in the Core Subjects Appropriate for Use with English Language Learners

State policymakers are struggling with how to include English language learners in accountability systems in the absence of reliable, field-tested assessment instruments for measuring their mastery of math, science, and social studies content. This problem is particularly acute in secondary schools. The Department of Education ought to help states develop assessment instruments in various primary languages and might also develop standards for assessing English language learners whose content knowledge in the core subjects might be validly assessed in English with appropriate accommodation. It should also help key states study the effects of their assessment systems on students with limited English proficiency.

2. Demonstration Grants — Promising/Exemplary Practices

The challenges presented by the organizational features of the typical secondary school suggest that a narrow focus on improving language development programs will yield only limited success with LEP students. Several studies of LEP and immigrant-serving schools indicate that exemplary schools focus on linking LEP students to whole-school reforms and tend to share four overarching elements. They: (1) involve all school teachers, administrators, and counselors in reform; (2) focus on bringing language development and mainstream subject teachers together; (3) expand the amount of time LEP immigrants spend in direct instruction in English and the core subject areas; and (4) emphasize sustained, long-term professional development for all school professionals.[34]

Exemplary strategies that require further demonstration and attention included:

- Explorations in how to implement whole school reforms in ways that take the special needs of LEP students into account (e.g., schoolwide professional development efforts, and organizational changes including block scheduling, and extended day/year initiatives).

- Developing alternative courses of instruction for special needs populations (including underschooled youth, and newcomer immigrants).

- Innovations in identifying gifted/talented LEP immigrants and promoting their preparation for postsecondary education.

- Innovations in promoting parental involvement among language minority parents.

3. Programs To Increase the Number of Teachers Who Are Prepared To Work with LEP Students

In the past decade, OBEMLA has placed increasing emphasis on teacher recruitment and professional development initiatives. Further, and perhaps expanded, support should be encouraged for:

- Grants to help schools and districts train all teachers who work with LEP students. These grants should also extend LEP-related training to key nonteaching staff, including counselors, administrators, and technology specialists.

- Grants to fund innovative career ladder programs designed to upgrade the qualifications and skills of existing bilingual classroom aides and others so they can be certified as language development teachers and other instructional personnel serving LEP students; and

- Fellowships in bilingual education for graduate studies on research and teaching of LEP students.

- Long-term teacher shortages may require that OBEMLA work to improve college preparation programs in ESL and bilingual education.

C. Ensure All Eligible LEP Students Participate in Title I

Roughly 60% of OBEMLA funds go to support general LEP instructional services — services that should otherwise be supported under the larger Title I program. State and local reliance on OBEMLA funds to support LEP instructional services has meant that fewer of the agency's dollars have been available to support the research, demonstration, and professional development priorities outlined above. One reason for this reliance on OBEMLA for general program support is that LEP students in many states and localities have been historically excluded from Title I services.[35] Likewise, other studies by the Citizens' Commission on Civil Rights have found that many states and school districts are continuing to fall short of fully incorporating LEP students into Title I programs.[36] Again, these findings support the need for requiring state and district Title I plans to spell out how eligible LEP students will be served with Title I funds.

Endnotes

[1] This report was written, in part, with support from the Spencer Foundation and the U.S. Department of Education, Office of Educational Research and Improvement. Opinions expressed herein are those of the authors.

[2] *See, e.g.*, Citizens' Commission on Civil Rights, *Title I in Midstream: The Fight to Improve Schools for Poor Kids* (Washington, D.C.: Citizens' Commission on Civil Rights 1999) ("*Title I in Midstream*").

[3] Public Law No. 107-110.

[4] *See Title I in Midstream*; Citizens' Commission on Civil Rights, *Closing the Deal: A Preliminary Report on State Compliance with Final Assessment and Accountability Requirements Under the Improving America's Schools Act of 1994* (Mar. 2001).

[5] Ruiz-de-Velasco, Jorge and Michael Fix, *Overlooked and Underserved: Immigrant Students in U.S. Secondary Schools*, at 50-52 (Washington, D.C.: Urban Institute Press 2001), available online at: *<http://www.urban.org/pdfs/overlooked.pdf>* ("*Overlooked and Underserved*").

[6] Although Title I contains precatory language indicating that states are obligated to ensure that poor and disadvantaged students have the resources and assistance they need to meet new standards, the Citizens' Commission for Civil Rights has previously noted that these provisions are not enforced. *See Title I in Midstream*. Indeed, under the current Title I framework, states are required to direct additional help and resources to schools only *after* the accountability system has been implemented and *after* schools have demonstrated an inability to meet standards.

[7] While not all students are expected to meet the standards initially, the typical performance timetable suggests an expectation that all students who initially fail can be brought within the standards within a short period of time, usually one school year.

[8] These issues are treated in greater depth in *Overlooked and Underserved*.

[9] *See, e.g., Overlooked and Underserved*; Terrence G. Wiley, *Literacy and Language Diversity in the United States*, at 112-114 (Washington, D.C.: Center for Applied Linguistics 1996); *Improving Schooling for Language-Minority Children* (Diane August and Kenji Hakuta, eds., Washington, D.C.: National Academy Press 1997) ("*Improving Schooling*").

[10] Howard L. Fleishman and Paul Hopstock, *Descriptive Study of Services to Limited English Proficient Students* (Arlington, VA: Development Associates 1993).

[11] *See, e.g.*, Ofelia Garcia, "Educating Latino High School Students with Limited Formal Schooling," *in So Much to Say: Adolescents, Bilingualism, and ESL in Secondary School* (Faltis and Wolfe, eds., New York: Teachers' College Press 1999) ("Educating Latino Students'").

[12] "Educating Latino Students;" *see also*, Betty J. Mace-Matluck *et al.*, *Through the Golden*

Door: Educational Approaches for Immigrant Adolescents with Limited Schooling (Washington, D.C.: Center for Applied Linguistics 1998); *Overlooked and Underserved.*

[13] Although Illinois has issued benchmarks for predicting how results from the state's language assessment test for LEP students (the IMAGE test) might translate to scores on the grade-appropriate ISAT language arts tests, there remains little guidance on how schools can help LEP immigrants meet the state standards in the other subjects. Illinois is not alone in this regard.

[14] U.S. Department of Education, National Center for Education Statistics, *Schools and Staffing Survey, 1993–94.*

[15] For example, Illinois does explicitly include mainstream teachers, administrators, and special education teachers in its LEP staff development programs and keeps track of their participation. Yet, while two-thirds of mainstream teachers in schools with bilingual education programs reported participating in multicultural awareness training, only about one-third of teachers in these high LEP-serving schools reported receiving training in language acquisition or other techniques for making their courses accessible to English language learners. ISBE, *Evaluation Report: Transitional Bilingual Education and Transitional Program of Instruction, Fiscal Year 2000* (ISBE Research Division Dec. 2000).

[16] *Improving Schooling* at 53-75.

[17] *See* Kenji Hakutu *et al.*, "How Long Does It Take English Learners to Attain Proficiency?," *in Policy Report 2000-1* (Santa Barbara, CA: University of California Linguistic Minority Research Institute 2000), available at *<http://www.imrinet.ucsb.edu/RESDISS/hakuta.pdf>; see also Improving Schooling*; Wayne Thomas and Virginia Collier, *School Effectiveness for Language Minority Students* (Fairfax, VA: George Mason University Press 1997).

[18] *See* Kris Anstrom, *Academic Achievement for Secondary Language Minority Students: Standards, Measures and Promising Practices* (Washington, D.C.: National Clearinghouse for Bilingual Education 1997), a report to the U.S. Department of Education, available at *<www.ncbe.gwu/ncbepubs/reports/acadach.htm>.*

[19] *Improving Schooling* at 29-45.

[20] *Id.* at 53-75.

[21] The issues raised in this section are treated in greater depth in *Overlooked and Underserved* at 55-65.

[22] *See, e.g.*, Carolyn Temple Adger and Joy Kreeft Peyton, "Enhancing the Education of Immigrant Students in Secondary School: Structural Challenges and Directions," *in So Much to Say: Adolescents, Bilingualism, and ESL in Secondary School* (Faltis and Wolfe, eds., New York: Teachers' College Press 1999), and authorities cited therein.

[23] *Overlooked and Underserved* at 56-60.

[24] Data source: Texas Education Agency, Office of Bilingual Education, Test Performance Summary Report, 10th Grade Exit Level administered Feb. 2001, for Limited English Proficient Students, reported Apr. 2001.

[25] *See, e.g.*, Melissa Roderick and Mimi Engel, "The Grasshopper and the Ant: Motivational Responses of Low-Achieving Students to High-Stakes Testing," 23 *Educational Evaluation and Policy Analysis* 197 (2001); Brian A. Jacob "Getting Tough? The Impact of High School Graduation Exams," 23 *Educational Evaluation and Policy Analysis* 99 (2001).

[26] Walt Haney, "Revisiting the Myth of the Texas Miracle in Education: Lessons about Dropout Research and Dropout Prevention" (Jan. 13, 2001) (paper prepared for the Dropout Research: Accurate Counts and Positive Interventions Conference, Cambridge, MA). Likewise, a new study finds that stricter high school graduation requirements resulted in a 3 to 7% jump

in the overall dropout rate during the 1990s. The Cornell and University of Michigan economists who conducted the study suggest that, absent interventions to help students meet new standards, changes in graduation requirements may translate to between 26,000 and 65,000 more high school dropouts a year nationwide. *See* Dean R. Lillard and Philip P. DeCicca, "Higher Standards, More Dropouts? Evidence Within and Across Time," 20 *Economics of Education Review* 459 (2001).

[27] L.D. Steinberg, S. Fegley and S.M. Dornbusch, "Negative Impact of Part-time Work on Adolescent Adjustment: Evidence from a Longitudinal Study," 29 *Developmental Psychology* 171-180 (1993).

[28] S. Graskey, "Exploring the Effects of Childhood Family Structure on Teenage and Young Adult Labor Force Participation," 1111-96 *IRP Discussion Papers* (Madison, WI: Institute for Research on Poverty 1996).

[29] Duncan Chaplin and Jane Hannaway, "High School Employment: Meaningful Connections for At-Risk Youth" (Apr. 1996) (paper presented at the Annual Meeting of the American Educational Research Association, New York).

[30] *See, e.g.*, U.S. Department of Education, *The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers* (2000).

[31] *See, e.g.*, OBEMLA's FY2001 budget, exclusive of funds earmarked for distribution under the Emergency Immigrant Education Act. Here $180 million of a $310 million budget is allocated to support instructional services.

[32] *See* H.R. 1, the "No Child Left Behind Act of 2001, Title III," reauthorizing the ESEA and signed by President Bush on January 8, 2002.

[33] Not inclusive of an additional $150 million in impact aid administered through the Emergency Immigrant Education Act to school districts with large numbers of newcomer students. These funds, though administered by OBEMLA, are not restricted for use in language development programs.

[34] *See Overlooked and Underserved* at 70-80.

[35] *See, e.g.*, Michael Fix and Wendy Zimmermann, *Educating Immigrant Children: Chapter I in the Changing City* (Washington, D.C.: Urban Institute Press 1993).

[36] Citizens' Commission on Civil Rights, *The Test of Our Progress*, at 193-201 (Washington, D.C.: Citizens' Commission on Civil Rights 1999).

Chapter 18

New Research on Special Education and Minority Students with Implications for Federal Education Policy and Enforcement

by Daniel Losen[1]

Introduction

Special education is intended to support and serve children with disabilities, not to be primarily a separate place to send students who need help in order to learn to their full potential. In theory, eligible students are to receive specialized instruction by teachers with specific training, tutoring, and extra attention from teachers, counselors, and other professional support staff. While for many students with disabilities this ideal has approached reality, historically, many others have experienced unnecessary isolation and been confronted with fear, prejudice, and stigmatization.

Furthermore, placement *in* special education has too often been a vehicle for segregating minority students. For example, research shows that black students are especially likely to be overrepresented in special education and less likely to be mainstreamed than similarly situated white students.[2] In 1998, approximately 1.5 million minority children were identified as having mental retardation, emotional disturbance, or a specific learning disability.[3] Over 876,000 of these were black or Native American. When the Individuals with Disabilities Education Amendments Act of 1997 (IDEA 1997) was passed,[4] Congress found that minorities are 2.3 times more likely to be so labeled when compared to whites nationally.[5] And to make matters worse, minority children who *do* need special education often receive low-quality services and watered-down curriculum instead of effective support to help them learn.

IDEA 1997 states that: "Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities."[6] To the extent that minority students are misclassified, segregated, or inadequately served, special education, which is meant to help, can instead contribute to a denial of equality of opportunity, with devastating results in communities throughout the nation.

Many education researchers believe that multiple and systemic reforms of both special and regular education need to take hold on both the state and local level because the concerns about overrepresentation and underservicing are regarded as rooted in both the regular and special education classroom.[7] Significant improvements will thus depend, in part, upon better coordinated, better targeted, and more transparent federal oversight, combined with improvements in the collection and dissemination of disaggregated data describing the condition of regular and special education of minority children. Also considered, therefore, are improvements to Title I of the Elementary and Secondary Education Act, meant to ensure that minority students and students with disabilities are given *meaningful opportunities* to meet high standards.

For parents seeking direct recourse, the IDEA contains strong language and numerous requirements that, if better understood by parents and more effectively implemented by school authorities, could reduce minority overrepresentation significantly. Chief among these are requirements for parental consent for the initial special education evaluation,[8] and parental rights to seek better services or re-evaluate their child's individualized educational plan (IEP), even after they have consented to a placement.[9] Along these lines, the federal government could have a greater impact by better enforcement of rules designed to ensure that parents receive complete information regarding the exercise of their legal rights.[10] Better informed minority parents would be better able to resist misdiagnosis, challenge inappropriate placements, or gain higher quality special education services, as the situation may warrant.

In addition, the federal government can do much to further systemic reform efforts. It can create more resources targeted at providing proven-effective programs and supports for minorities, economically disadvantaged students, and students with disabilities — such as the community parent resource centers; and it can facilitate working partnerships between school districts, parents, and advocates representing poor and minority parents and their children.

Finally, many of the problems highlighted call for focused attention through serious civil rights enforcement by federal agencies. Enforcement should include, if necessary, temporary cutoffs of funding to individual school districts that are unwilling to address gross racial disparities in identification and placement.

I. Background

Historically, enforcement of IDEA requirements has relied heavily on parents' pursuit of administrative complaints. Because the weight of enforcement has fallen on individual litigants, many poor and minority parents, who often can't afford to shoulder the burdens involved in claiming their delineated rights,[11] do not reap the benefits that accrue to middle-class suburbanites armed with experienced lawyers.

In 1997, after unusual bipartisan congressional negotiations, Congress reauthorized IDEA with added emphasis on the requirement that *all* students be held to high standards. In one new provision Congress required monitoring and enforcement to address *both the overrepresentation of minorities in identification for special education, and their placement in overly restrictive educational environments.* The provision further required "the revision of policies, procedures and practices used in such identification and placement" to ensure compliance.[12] Despite these legislative improvements, research suggests that the new provisions did not have much of an immediate impact.

New studies, presented at the Conference on Minority Issues in Special Education at Harvard University, Fall 2000, highlighted the persistence of dramatic disparities in identification and placement, as well as important gaps in information gathering on minority and English language learner (ELL) students with disabilities.[13] The research presented also examined federal enforcement achievements and shortcomings and shed new light on problems within the current system of federal oversight and enforcement. Conclusions drawn from the Harvard conference, combined with other sources, form the basis for the recommendations at the end of this chapter.

Following a congressional briefing on these research findings in March of 2001, many politicians made misleading assertions and misrepresentations regarding these findings to bolster their arguments against guaranteed funding of the Individuals with Disabilities Education Act. The studies described in this chapter lend no support whatsoever to an argument that either guaranteeing or fully funding the Individuals with Disabilities Education Act would exacerbate the problems highlighted by our research, or that minority students would reap any benefit by limiting increases to federal special education expenditures. Use of this research to oppose federal special education funding guarantees or increases is a clear distortion of the findings. In fact, one can logically infer from this independent research that a substantial infusion of funds is needed to strengthen federal enforcement to ensure proper IDEA implementation and protection of civil rights.

II. Key Education Research Findings with Implications for Federal Policy

A. Research Findings

1. Subjectivity of Assessment Confounds "Neutral" and "Objective" Determinations of Special Education Eligibility

The IDEA 1997 Act specifically requires that the identification of students for special education eligibility be based on multiple measures, i.e., not just one test score, and that the analysis must rule out the effect of poverty and multicultural differences. Many states and school districts still rely heavily on IQ and other tests because they regard the reported results as objective, scientific measures.[14] This faith in testing reportedly drives the decisions of too many educators in determining special education eligibility and placement, subverting the intention of the IDEA.[15]

New research by Dr. Beth Harry and others reveals how reliance on test scores is very often inappropriate. The special education eligibility evaluation process is frequently regarded as a set of discrete decisions based on scientific analysis and assessment. In reality, the evaluative decisions are more subjective, with many interdependent variables, including school politics, teacher perspectives on disability, and cultural bias. Harry's new research describes how subjectivity creeps into elements of the testing *process*. These include deciding whom to test, what test to use, when to use alternative tests, discretion in interpreting student responses, and determining what weight to give results from specific tests.

A host of other nontesting factors such as the quality of regular education, the classroom management skills of the referring teacher, and the power imbalance between the parents and the school personnel on the evaluation team are equally important, yet often go unrecognized.[16]

Although Dr. Harry concludes that the analysis of test results provides very important information, her qualitative research sheds considerable doubt on the objectivity of test use in special education decision-making because *even decisions that are test driven are inescapably subjective in nature.* Dr. Harry's research suggests that we must acknowledge that *even the best evaluations are filled with subjectivity,* and that systemic disproportionate outcomes reflect deeper problems, requiring deeper systemic reforms.

2. Race/Ethnicity and Gender Account for Significant Overrepresentation of Minority Students, Even After Accounting for the Effect of Poverty

Poverty and other socio-economic factors correlate highly with the incidence of disability, but once socio-economic factors are accounted for, the effect of gender and race remains significant.[17] In the most profound example, contrary to expectations, as factors associated with wealth and better schooling increase, black males are at greater risk of being disproportionately labeled "mentally retarded."[18]

Research on national trends, and conforming data on the state and local levels, indicate that minority students are significantly more likely than similarly situated white students to be placed in restrictive special education environments, segregated from their nondisabled peers.[19] This persistent pattern has lasted for well over 20 years,[20] and holds true for most minority groups across nearly all disability categories.

Recent demographic studies have revealed more alarming patterns. Latino students, who as a group often appear underrepresented in state and national aggregated data, are increasingly likely to be overrepresented in special education as their proportion of a given state's minority student body increases.[21] Another study revealed that *the likelihood of mainstreaming with regular education peers, for African American, Latino, Native American, and Asian children decreases as the percentage of each minority subgroup's population increases.*[22] Lastly, preliminary research on school districts in California suggests that English language learners who are immersed in English language classrooms are more likely to be identified for special education and placed in restrictive special education classrooms than students in bilingual programs.[23]

3. Under-Servicing of Minority Students Increases the Likelihood of Discipline Problems, School Ffailure, and Dropping Out

The lower quality special education that minority students often receive has dire consequences. One is that they are more vulnerable to being subjected to unnecessarily harsh new zero-tolerance discipline policies sweeping the country. For example, according to new research by Osher, Woodruff, and Sims, minority students are less likely than their white counterparts to receive counseling and psychological supports when they first exhibit signs of emotional turmoil and often go without adequate services once identified. According to this research, the lack of early intervention and support helps explain why minority school-aged children are overrepresented in the juvenile justice system.[24] Furthermore, in a study by Oswald, Coutinho, and Best, within three to five years of leaving high school, arrest rates for African Americans with disabilities is 40% compared with 27% for whites with disabilities.[25]

4. High Stakes Accountability Can Contribute to Serious Problems for Minority Students with Disabilities

Although the relative benefits of high-stakes testing is a heated education reform issue, educators on all sides of the debate acknowledge problems with the way these tests are administered in many states and local school districts.[26] The high-stakes tests referred to in this analysis employ diploma denial or score-based retention to hold students accountable, *regardless of whether they have been afforded an opportunity to learn the material tested.* Unfortunately, the increasing imposition of high stakes on students poses a host of problems for children with special needs.[27] Further, the detrimental impact of high stakes on students implicates possible violations of the IDEA and Title VI, as well as some state laws.

a. Incentives to Exclude Students from Assessments

Historically, students with disabilities have been excluded from district and statewide assessments. The fact that there has been so little accountability for their rate of achievement explains, in part, how special education has become synonymous in many places with low expectations and watered-down curriculum. One goal of standards-based reform, incorporated into IDEA 97 and the newly reauthorized Elementary and Secondary Education Act, is to ensure that the achievement rates of the overwhelming majority of students with disabilities are considered when schools are evaluated for performance.[28]

IDEA 1997 already requires states to report the number of students with disabilities participating in state and district assessments. Despite this requirement, according to the National Center on Education Outcomes 1999 Report (NCEO), only 23 states reported these numbers. NCEO used state-provided numbers of students participating in assessments, in conjunction with child count data, to calculate the percentage participation rates. For example, in Texas, fewer than 42% of students with disabilities took a statewide high-stakes achievement test in grade 10.[29] And in only five states did more than 90% participate in statewide assessments, regardless of stakes.[30] Title I reporting is also quite low, with numerous states failing to report student performance by race or disability and many inappropriately exempting students with disabilities from state tests.[31] With test participation rates so low, the achievement levels of students with disabilities remain hard to ascertain and their programs of instruction hard to evaluate. Moreover, the existence of a high number of students with disabilities who do not take the tests runs counter to two federal requirements: (1) Title I, which requires that students with disabilities be assessed in accordance with the state's high standards, and that scores for students with disabilities be reported in disaggregated form;[32] and (2) IDEA 1997, which requires that students with disabilities be included in state assessments for both IDEA reporting and accountability purposes.[33]

b. High-Stakes Tests Increase the Likelihood of Exclusion

According to research of the National Center on Education Outcomes, adding high stakes to standards-based assessments appears to be driving much higher rates of test exclusion than ever before.[34] For example, in Texas, where according to the NCEO 1999 Report, 42% or fewer students with disabilities participated in the Texas Assessment of Academic Skills (TAAS), the number of special education students has blossomed since high stakes were added to statewide assessments.[35]

Historically, the same accountability failure applies to ELLs, and ELL students with disabilities. By creating even greater incentives to mask the low achievement of students with disabilities, some argue that high stakes are undermining standards-based reform.[36] Large numbers of ELLs are not tested with statewide assessments.[37] The scant data on ELLs suggest that those students who are tested are often not provided with the appropriate test accommodations. English language learners with disabilities are even less likely to be identified, assessed, or given appropriate accommodations for testing.[38]

c. Using Tests for Invalid Purposes, or Using Invalid Tests, Exacerbates Educational Injustice

When students with disabilities are required to take high school diploma tests, or tests used for grade promotion, they fail at a much higher rate than their non-disabled peers. This pattern is likely even more pronounced for minority students with disabilities given that data show each group, viewed separately, is at a very high risk. Evidence suggests that many students deemed eligible for special education are not provided with the opportunities to learn the tested material and not provided with the accommodations they are entitled to legally.[39] Moreover, minorities with disabilities are much less likely to receive or request test accommodations than whites.[40]

Furthermore, to the extent that minority students with disabilities are more likely to be restricted in their placement, and thereby access to the tested curriculum, they are more likely to be either excluded entirely or tested without having received adequate opportunities to learn. The new education law, which mandates testing at grades 3-8, will likely exacerbate these problems, especially in states placing the high stakes on students.

5. Some State Funding Mechanisms Appear To Increase Minority Overrepresentation in Special Education

Where state funding is weighted to spend more money in relation to the degree of disability, black students often face a greater chance of being labeled "retarded" and placed in restrictive programs. Moreover, such programs receive less money per student than in states where the funding is not weighted by severity of disability.[41] The federal government is charged with reviewing state formulas. Federal formulas, which were restructured in 1997 to reduce restrictive placements, carry only a small percentage of the special education funds. State formulas often contain no explicit restriction. This research is pertinent to federal enforcement because the U.S. Department of Education's Office of Special Education Programs (OSEP) can review state funding formulas that interfere with proper implementation of the IDEA.

B. Findings on Anti-Discrimination and IDEA Enforcement

1. The Legal Landscape

Before IDEA 1997, the few systemic checks on widespread overrepresentation resulted primarily from either desegregation related litigation or compliance reviews conducted by the U.S. Department of Education's Office for Civil Rights (OCR) pursuant to Title VI of the Civil Rights Act of 1964 (Title VI) and the Equal Protection Clause. Legal challenges to minority overrepresentation in special education are still most often raised in these two contexts. Where the Department of Justice (DOJ) is a party to a desegregation action, the overrepresentation issue falls within DOJ's jurisdiction. Because OSEP implements IDEA, this agency also plays a critical enforcement role.

In addition to the anti-discrimination provisions of Title VI and its implementing regulations,[42] there are three laws in play with regard to the problematic overrepresentation and underservicing of minority youth in special education. Section 504 of the Rehabilitation Act of 1973 (section 504), Title II of the Americans with Disabilities Act (Title II), and the IDEA provide procedural and substantive protection for students who have been misclassified and/or placed in overly restrictive settings. Section 504[43] and

Title II[44] are federal anti-discrimination laws that prohibit discrimination based on disability and are applicable in public schools. Section 504 can be assumed to cover Title II as well, due to parallel language and interpretations of the laws.[45]

a. FAPE and LRE

By law, all students with disabilities are entitled to be educated with their regular education peers to the maximum extent appropriate given each student's special education needs.[46] This ensures exposure to the same curriculum, the same high academic standards, and the same opportunities for socialization.[47] The shorthand version of this concept is taken from language in the IDEA: a Free Appropriate Public Education (FAPE)[48] in the Least Restrictive Environment (LRE).[49] The concept of LRE is subsumed under the definition of "appropriate" in FAPE.[50]

Individually, some students undoubtedly benefit from educational settings apart from the regular classroom. Accordingly, IDEA authorizes student placements based on individual needs, rather than based on disability type such as "educationally mentally retarded." The right to an individual eligibility determination and subsequent IEP, along with the right to be educated with regular education peers to the "maximum extent appropriate,"[51] lie at the heart of the FAPE and LRE provisions.

The 1997 IDEA amendments reemphasized the Act's 25-year-old preference that students with disabilities be taught in the regular education classroom.[52] The Act's congressional findings noted that IDEA's successful implementation "has been impeded by low expectations" and acknowledged substantial concerns about segregated classrooms[53] because isolated students are usually worse off in comparison to similarly situated mainstreamed students.[54]

b. Differences Between IDEA and Section 504

There are important differences between the legal requirements of 504 and IDEA relevant to overrepresentation and underservicing concerns. For instance, the IDEA applies only to students who, because of their disability, need special education and related services.[55] Section 504's protections, on the other hand, include all students covered by IDEA as well as students whose disabilities substantially impair one or more major life activities.[56] A student in need of counseling outside of the classroom would not be covered under IDEA but could be covered under section 504.[57] Most protected individuals under 504 are entitled to a "free appropriate public education" in much the same way that students with qualifying disabilities are entitled to FAPE under IDEA.[58]

If a minority student were identified as educationally mentally retarded but did not, in fact, have a disability, that student would not need special education services and have no direct recourse under IDEA to remedy the harm suffered. Such a student would not be entitled to a FAPE under the IDEA.[59] But such a student, if harmed by the wrongful placement, could be eligible for FAPE under section 504.[60]

At a minimum, misidentified students are protected from discrimination that resulted from "having a record of" or being "regarded as" having a disability. The regulations, for example, state that a *nondisabled individual* is covered because, "*Has a record of* such an impairment means *has a history of*, or *has been misclassified as having*, a mental or physical impairment that substantially limits one or more major life activities."[61] Accordingly, such nondisabled students are specifically covered under section 504's definition of "qualified handicapped person."[62]

Furthermore, OCR regards failure to provide FAPE as a form of disability discrimination under section 504.[63] OCR has jurisdiction over many discrimination complaints that fall under section 504. The legislative and enforcement regime thus implicates, in some situations of FAPE denial, two different laws and two different federal agencies for enforcement.

2. OCR Enforcement

a. Theory

By design, the Office for Civil Rights seeks to ensure voluntary compliance with federal civil rights acts. Its investigations typically emphasize either "different treatment" or "disparate impact" analysis under Title VI. The critical legal issue is that under the regulations the first requires proof of intent while "disparate impact" does not. Specifically, *the Title VI regulations describe an "effects test" prohibiting the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination or have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the educational program."*[64] As an enforcement agency, OCR looks for evidence of intent that can support a different treatment analysis or bolster a disparate impact case.[65]

In other words, the department's regulations under Title VI allow complainants and investigators to rely on statistical evidence of discrimination in determining noncompliance. School districts may violate Title VI "disparate impact" regulations if a neutral school policy disproportionately burdens a protected minority group even though the district did not intend to discriminate.

OCR conducts the following three-pronged analysis, borrowed from case law, to determine whether the effects of a school district's policy or program violate the Title VI regulation.[66] First, the agency asks whether a criterion or method of administration has both a negative and disparate impact on a protected class.[67] If so, the school district must demonstrate that the policy or practice at issue is an educational necessity. Upon such proof, OCR explores whether there is a less discriminatory alternative that can reasonably meet the district's "educationally necessary" goals.[68]

OCR does not generally have jurisdiction over individual IDEA cases, but it does have enforcement jurisdiction in numerous disability-related cases under section 504 and the ADA. In fact, disability related complaints account for more than half of OCR's complaint caseload.[69] These include all cases in which students with disabilities are not legally protected by IDEA but can include FAPE-based complaints — where exhaustion at the state administrative level is either not required or has been completed.[70] To the extent that a state fails to respond to systemic complaints about either the isolation of minority students with disabilities or significant inequalities in services caused by a district's IDEA violation, state inaction alone may constitute a violation of Title VI.[71] Moreover, the agency can explore both Title VI and section 504 legal issues as they arise in the same case and combine the two for investigation and analysis.[72]

In fact, OCR has actively sought to deter unjustifiable disproportionate identification of minority students for special education, often in overly restrictive settings. But OCR intervention is most likely to have a meaningful impact if it also prompts a combination of voluntary compliance and intervention by the state in similar cases. The agency responds to complaints, but the agency also provides guidance on law and policy, including "technical assistance" to potential complainants.

To further encourage compliance, the agency regularly requests data for enforcement purposes.[73] The agency then selects schools and school districts whose data depict troubling patterns for closer investigation called "compliance reviews."

With thousands of district data to review, the whole scheme to encourage compliance on a national scale rests heavily on a deterrence theory. An integral part of such a deterrence model is that the public at large will become aware of civil rights laws, and can initiate political, legal, and administrative action on the state and local level where noncompliance is evident.

b. Practice

As a matter of enforcement policy, OCR seeks to resolve concerns about potentially unlawful discrimination through a "partnership process" without issuing a letter of violation against the school district.[74] Consequently, the agency rarely issues findings of violation, instead reaching negotiated agreements with the districts. Although there are clear benefits to this approach, the partnership approach may seriously undermine any potential deterrence effect if it is relied upon too heavily.

Faced with staggering statistics indicating that the overrepresentation of minorities is widespread, the agency has conducted 171 compliance reviews, an average of approximately 23 school districts each year since 1993.[75] Although this number seems small, before 1994, little attention was paid to this issue despite well-documented and deeply disturbing evidence of a problem from the National Academy of Sciences in 1982 and other indices dating back even earlier.[76]

c. OCR's Enforcement Flaws in Strategy and Implementation

i. Theoretical Disconnect

One obvious problem is that for school districts, the threat of being found "in violation" of a law barring discrimination is much more serious than having to enter a resolution agreement, where no acknowledgement of unlawful activity is required. Only three of OCR's interventions in these types of cases resulted in "letters of violation" since 1994 and none in the last few years. Despite the punitive ring to "letter of violation," these letters are only one rung in an incrementally adversarial range of enforcement options. For example, the Department can follow a violation by withholding federal funds, but there is a great deal of discretion about when to withhold. Further, the issuance of a letter of violation does not preclude negotiated settlement and does not carry the same punitive stigma as a fully litigated court decision against the school district. Moreover, by issuing violations, OCR more clearly identifies unlawful policies and sends a straightforward compliance message to onlookers.

ii. Information Gap

A more serious flaw in OCR's current enforcement is the lack of information the agency provides to school districts and the public at large on its enforcement efforts, along with the absence of clear and official guidance on how states should determine when disproportionality is significant.[77] This flaw is especially problematic given the agency's reliance on deterrence and partnerships to reach compliance. Simply put, school districts, and the public, rarely know about OCR's interventions, leaving both school officials and advocates guessing as to OCR's interpretation of its own regulations. Furthermore, despite the creation of an interagency national task force, there is no nationally linked system for reporting and recording the full text of minority special education cases within the agency.[78] This makes agency evaluation especially difficult for outsiders as well as internally.

iii. Internal Constraints

OCR is subject to bureaucratic and political pressures that limit the effectiveness of its enforcement activities. The impact of bureaucratic pressures can be seen in a July 6, 1995, internal memorandum from former Assistant Secretary of Education Norma Cantu to all OCR staff entitled, "Minority Students and Special Education."[79] This memo offers a detailed outline of how to investigate for possible violations of Title VI and section 504.[80] These combined approaches would, as a general rule, involve more intensive investigations and more comprehensive remedies. After introducing this prospect, however, the OCR memorandum recommends that the "approach . . . should be used only in selected cases" where preliminary data do not permit the investigation to be narrowed.[81] Accordingly, OCR has stated that when it receives complaints concerning minority issues in special education, the agency rarely investigates beyond the specific issues raised by the complainant.[82] OCR enforcement will unlikely have a broad impact if the agency continues to take this conservative investigatory approach.

iv. Inconsistencies and Weak Monitoring

The agency's lack of clarity has apparently resulted in a high degree of enforcement inconsistency. A review of OCR resolution agreements, plus discussions with attorneys who have filed complaints with the agency, suggests that agency enforcement is weak in three ways. First, OCR's methods of investigation vary substantially from case to case.[83] Second, and related to the first, there is inconsistency in terms of the comprehensiveness of the remedy sought by the OCR when districts have entered into resolution agreements.[84] Third, OCR's rigor in subsequent monitoring also appears to be weak. This last concern has been acknowledged by the agency, and OCR spokespersons have stated that significant changes have been implemented. Unfortunately, because the agency is under-staffed[85] any shift in policy toward better monitoring is likely to decrease its capacity to investigate complaints, conduct new compliance reviews, or provide technical assistance. Despite a steady stream of complaints that raise both race and disability, data on OCR-initiated reviews of minority overrepresentation in special education dropped considerably between 1995 and 2000.[86]

3. OSEP Enforcement

OSEP is charged with monitoring IDEA implementation at the state level to ensure proper enforcement by state administrative authorities. OSEP reviews state plans for implementation and approves or disapproves of funding. Monitoring includes state enforcement efforts with regard to local districts. OSEP also issues detailed reports of noncompliance, provides technical assistance to states, and can take a range of enforcement actions when states fail to comply.[87]

IDEA requires extensive reporting and monitoring of its provisions by state governments. Similar state obligations are incurred through receiving Title I funding.[88] Among the many IDEA provisions are those requiring states to:

- Monitor school districts for potential discrimination in suspensions and expulsions of children with disabilities;[89]

- Establish performance goals, using indicators such as performance on assessments, dropout rates, and high school completion;
- When the state's indicators point to ineffective progress for students with disabilities, the state must adjust its improvement plan accordingly;[90] and
- Intervene by revising policies, procedures and practices, where significant racial disproportionality exists in special education identification and placement.[91]

a. Enforcement History

In January 2000, the federal government's independent National Council on Disabilities (NCD), charged with evaluating OSEP's effectiveness, recognized recent and substantial improvements but nonetheless issued a scathing report detailing serious and persistent enforcement failures over the preceding 10 years.[92]

The disability categories most prone to restrictive placements are "Emotionally Disturbed" and "Mentally Retarded."[93] Therefore, OSEP's failure to enforce LRE requirements, whereby 72% of states were out of compliance according to the NCD Report, is most disconcerting given the potentially adverse impact on minority students from widespread noncompliance. The report also highlights OSEP's failure, in approximately 78% of all states, to ensure compliance with procedural safeguards. These include the failures to insure that schools receive informed parental consent before a child is evaluated and/or placed, and that parents be provided information about their rights in a manner and language they can understand. The failure to provide this important legal information may indirectly contribute to racial disproportionality.

Furthermore, the latest statistical evidence, presented at Harvard's conference, suggests that neither state nor federal governments have put adequate mechanisms in place for collecting and reviewing data, or effectively intervened where data have strongly suggested that disproportionality should be a concern. This inference is supported by the NCD report, which indicates that at least 35 states (70%) are out of compliance with monitoring requirements of IDEA, generally.[94]

b. OSEP Enforcement Options

According to Dr. Thomas Hehir, OSEP could be more effective, generally, in the way it combines its role as grantor and enforcement agent.[95] Dr. Hehir points out that enforcement options to IDEA in 1997 varied the enforcement palette of OSEP and in so doing strengthened the agency's ability to ensure compliance.[96] Most important, the new options enable OSEP to exercise its prerogative to withhold funding more often, because of the addition of *partial withholding* as an option. Previously, when faced with noncompliance, the agency had to either withhold the entire grant to a state or pursue actions that had no effect on the flow of grant money. By employing a measured approach, OSEP can now bring focused pressure on state education agencies (SEAs) to be more aggressive in their own monitoring and would rarely need to recommend denying all funding outright.[97] According to Dr. Hehir, incremental withholding would likely be more effective, in part, because the agency could avoid the high degree of confrontation and intense political backlash that threats of wholesale withdrawal of federal funding have triggered in the past.[98]

Despite the availability of these new options, the NCD Report states that OSEP has failed to utilize them and that "There appear to be no clear-cut, objective criteria for determining which enforcement options ought to be applied and when to enforce in situations of substantial and persistent noncompliance."[99]

c. OSEP Enforcement and Dropouts

Currently the IDEA requires that states examine "at a minimum" the performance of students with disabilities on statewide assessments, dropout rates, and high school completion in determining adequate implementation.[100] Research recently commissioned by Achieve Inc., and The Civil Rights Project at Harvard University[101] show that nationally the dropout problem is relatively acute in 300 inner-city schools with rates greater than 50%, and that most of these schools have student bodies that are more than 90% minority. But these new studies also showed that dropout rates are usually underreported.

Most important, completion rates alone often distort the level of school success by combining those students who earn a GED or alternative certificate of completion with those who earn a bona fide high school diploma. Given these astonishing figures, which likely encompass a disproportionate number of minority students with disabilities, OSEP should intensify efforts to pressure states to improve dropout rates as required. The IDEA could also be improved upon substantially through legislation that required the reporting of "graduation rates" by race with disability status.

In Title I of the newly reauthorized Elementary and Secondary Education Act, graduation rates, defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years, must be reported publicly and used to determine whether schools are making adequate yearly progress.[102] If IDEA's existing requirements for evaluating implementation were made to conform with this graduation rate standard, revealing data would be available, and pressure to meet a more meaningful barometer of success would be applied. Further disaggregation of graduation rate disability data by race would help ascertain where minority students with disabilities were receiving inadequate supports and services.

4. Systemic Intervention by Justice Department

The DOJ has been engaged in school desegregation lawsuits for over 25 years. In some cases, an entire state may be impacted by a court order. Present-day minority overrepresentation in special education in a given school district may evidence the continuing impact of a prior dual system in that district (as well as a veiled continuation of that system). This argument has successfully prompted courts to modify desegregation orders, requiring school districts to address racial disparities in special education.[103]

In one recent example, Alabama District Court Judge Myron Thompson consolidated the issue of unitary status and reviewed eleven school districts pursuant to *Lee v. Macon County*.[104] On August 30, 2000, the District Court issued a revised consent decree in all 11 cases addressing the state's persistent problem of minority student overrepresentation in special education.[105] The decrees are comprehensive, including remedies for overrepresentation in the categories of "emotionally conflicted," specific learning disability, and mental retardation. Alabama, which previously had one of the worst track records of any state in terms of statistical overrepresentation of African Americans,[106] agreed to extensive corrective measures, which included: awareness and prereferral training; monitoring the agreement, including yearly status conferences; changes to the Alabama Code including to require prereferral intervention for six weeks, in most cases, before a child can be referred for special education; revamping the assessment to include home behavior assessments and other contextual evaluations; providing culturally sensitive psychometrics and training; funding to accomplish the decree's goals using a state improvement grant; and reevaluation of all borderline MR students.

5. Changes in the Legal Landscape

The Supreme Court recently ruled in *Alexander v. Sandoval* that there is no "implied right of action" to enforce the Title VI disparate impact regulations in court. However, Justice Stevens, dissenting, stated that it was *"likely"* that plaintiffs could still enforce the disparate impact regulations in court under a civil rights statute called "Section 1983." This important legal distinction means that court actions against public schools might still be viable, despite the *Sandoval* ruling. Even if court actions invoking the disparate impact regulations prove untenable, the ruling in *Sandoval* does not change the fact that a public school district can be challenged on disparate impact grounds in a complaint made to OCR, or in an investigation initiated by the agency.

III. Recommendations for Improving Federal Implementation and Enforcement Efforts for Minority Students

A. Research-Based Policy Recommendations

- Improvements in the quality of instruction and curriculum for minority students, in both regular and special education, should be top priorities if the patterns of minority overrepresentation in special education are to be remedied.[107] Perhaps the best way to measure whether quality has improved is by using graduation rates for accountability purposes under the IDEA along with test scores reported by race and disability under Title I.

- Until there is a sound basis to believe that potential test takers, including students with disabilities, have had meaningful opportunity to learn the tested material and receive appropriate accommodations when tested, the attachment of high student stakes such as diploma denial or grade retention should be put on hold.[108]

- Greater support to meet the specific educational and emotional needs of minority students, through improved research, early intervention, and sustained services, is needed to stem the dangerous flow of minority school children into the juvenile justice system.[109]

- Pursuant to the IDEA's provisions on racial disproportionality, OSEP and OCR should work together with states to gather and disseminate school and district data on minority identification and placement rates.

B. Enforcement Recommendations

In general, the persistent and disturbing pattern of overrepresentation and underservicing calls for stepped up enforcement and oversight activity by the federal government. Yet the important potential enforcement ripple effect is severely mitigated by OCR's preference for investigation and identification of particular violations over more systemic ones, combined with the preference for negotiated settlements and its failure to proactively disseminate those agreements and other information about outcomes, monitoring, and enforcement policy to the public. To encourage more widespread compliance, OCR should aggressively disseminate information on its enforcement activities and maintain an easily accessible database documenting its activities. OSEP, for their part, should make better use of the new enforcement options, especially the partial withholding of funds to target specific compliance. Both agencies should bring intensive pressure to bear on states for failure to monitor and intervene in the face of persistent and significant overrepresentation.

I. Comprehensive Systemic Reform

Because the process of identification and placement for special education is fundamentally a subjective one, state and federal enforcement agents, who respond to disproportionality, should not be swayed from intervention simply because school districts appear to rely on so-called "objective" testing and are in procedural compliance with the IDEA. Rather than seeking to "fix" the test or other discrete aspects of the process, school districts with significant disproportionality should be required to pursue multiple measures that address effectively the needs of minority students in both regular and special education, as measured by *outcomes as well as inputs.*

Solving the problems of overrepresentation and underservicing of minority students, therefore, will require a comprehensive systemic approach. This suggests that state and federal agents who intervene should provide technical assistance and supports that consider the needs of students and teachers in regular education classrooms and not simply seek to correct numerical disparities in special education.

2. Data-Driven Intervention

Federal oversight can ensure that uniform and quality data on identification and placement by race and ethnicity, already required for state collection and analysis by IDEA, are actually collected and reviewed rigorously each year. Compliance reports specific to these issues should be disseminated to all school districts, with guidance on best practices for data collection and guidance on how to address significant overrepresentation. Technical assistance should be made readily available to those districts acknowledging problematic racial disproportionality.

C Remedies and Partnerships — Collaboration Stimulated by Federal Enforcement

I. Utilizing Models for Proactive Measures

Two recent settlements, brought on behalf of primarily minority students in Chicago, suggest that school districts and states will be found liable if they fail to take the requirements under IDEA and section 504 seriously. Specifically, plaintiffs in the *Corey H.* case settled with the Board of Education for Chicago and the State of Illinois (but litigated through the liability stage with the State) won substantive improvements in teacher training, scrutiny of special education referrals, evaluations, and performance goals for students with disabilities.[110] The settlement also resulted in a multimillion-dollar infusion of funds for measures designed to increase access to the regular education classroom and curriculum. OCR and OSEP can help states reduce minority overrepresentation and generate more effective special education services for minorities by observing carefully the court-ordered remedies for these problems in Illinois and Alabama and by helping other states that are out of compliance adapt the most effective of these measures.

2. Input Remedies

Enforcement agents should seek remedies that research suggests improve both regular and special education. These include higher-quality, experienced teachers, more teacher training in what is popularly called "classroom management," training for special and regular education teachers in academics; smaller class sizes and the use of programs of instruction that are proven effective; more inclusive, heterogeneous classrooms; teacher practica in inclusive and multicultural settings; certification requirements that reflect IDEA mandates; time for regular and special education teacher collaboration and problem solving; more pervasive and effective student supports and services (and corresponding additional resources); and incentive programs to attract and keep talented, multilingual special educators.

3. Output Remedies

When the government does intervene, it should include incentives to improve outcome measures that focus on achievement of students with disabilities and those who have been misidentified and need to be transitioned back into regular education classrooms. Remedies must ensure that the above-listed inputs are evaluated and refined. Federal enforcement agents, working together with state and local authorities, can anchor measures of effectiveness by using the states' own Title I mechanisms for determining adequate progress. Parties to OCR resolution agreements and OSEP compliance agreements can sit down together, as did the Parties in *Corey H.*, to hammer out realistic numeric goals and create multiyear plans to ensure the necessary inputs are employed and outcomes measured accurately. To this end, education researchers should be better utilized to assist attorneys and school officials in analyzing which inputs are most effective in improving regular and special education.

4. Remedies That Focus on Race and Ethnicity

The new provisions in Title I that require improved graduation rates,[111] as well as steady progress of minority groups and students with disabilities on assessments, can ensure that remedies educators *believe* will help relieve the disproportionalities actually *do so*. Moreover, when inadequate reading and math instruction is one of the causes of overrepresentation in special education (regardless of race), remedies that are focused on misidentified minority students can seek significant improvements in curriculum and teacher quality in those subject areas, and target classrooms serving minority students.[112]

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Additionally, useful data for monitoring compliance by disaggregating data on outputs by race and ethnicity along with disability classification are needed. These additional data linking race and disability data could help monitors judge the efficacy of input remedies that seek to reduce rates of minority special education referrals, such as teacher training in classroom management and multicultural education for both regular and special education teachers. Given the many (nonracial) compliance issues facing states, there is little incentive for states to focus on racial inequities in special education without specific pressure from the federal government on this issue.

IV. Conclusion

Motivation, Partnerships, Transparency, Informed Consent, and High Standards: These recommendations emphasize the federal government's role in generating problem-solving partnerships, providing useful information for evaluating and improving intervention by state and local government, and making problems easier to identify and analyze. By suggesting enhanced federal oversight and enforcement these recommendations should not be misconstrued as favoring heavy-handed federal intervention. Court orders and withholding of funds are absolutely necessary, especially when poor and minority students are confronted with obstinate school authorities in charge of failing systems. But most public school officials respond to a combination of redirection and an infusion of supports. To remedy the problems described above, therefore, school administrators, teachers, parents, advocates, and community leaders must receive far more concrete support in understanding their rights and responsibilities, and be provided the resources to set and meet high standards for minority children and children with disabilities.

Endnotes

[1] This chapter is based primarily on the executive summary of The Civil Rights Project at Harvard University's (CRP) Conference on Minority Issues in Special Education (Nov. 17, 2000). The conference research papers cited in these notes are all in draft form and on file with the author. Many of the papers cited are expected to be published by the Harvard Education Publishing Group in a forthcoming book. Some portions of this chapter, not cited, were taken from *Systemic Challenges: Comprehensive Legal Responses to Inappropriate and Inadequate Special Education Services for Minority Children*, by Daniel J. Losen and Kevin G. Welner. The author would like to thank the Spencer Foundation for their support for the research commissioned and the conference that followed.

[2] The data are less consistent for other minority groups, often indicating under-representation for non-black minority students. However, data from California show the percentage of every racial and ethnic subgroup that received services in a mainstreamed regular education classroom was lower than that for white students. *See* Tom Parrish, *Disparities in the Identification, Funding and Provision of Special Education*, at 25 (Table 6) ("Parrish"). *See also* Edward G. Fierros and James W. Conroy, *An Examination of Restrictiveness in Special Education ("Examination")*.

[3] These figures are all based on the Office for Civil Rights (OCR) *1998 Elementary and Secondary School Civil Rights Compliance Report Projected Values for the Nation* (1999).

[4] 20 U.S.C. § 1400 *et seq.*; Individuals with Disabilities Education Act Amendments of 1997; Public Law 105-17. IDEA was originally enacted in 1975 as the "Education for All Handicapped Children Act of 1975" (Public Law 94-142).

[5] 20 U.S.C. § 1401 (c)(8)(C).

[6] 20 U.S.C. § 1401 (c)(8)(A).

[7] *See, e.g.*, Dr. Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Strategies for Change* (CRP Conference) ("Hehir"); Sharon Soltman and Donald Moore, *Ending Illegal Segregation of Chicago's Students with Disabilities: Strategy, Implementation, and Implications of the Corey H. Lawsuit* ("Soltman and Moore").

[8] 34 C.F. R. § 300.504, 505; 20 U.S.C.§ 1414, 1415.

[9] 20 U.S.C. § 1414, 1415.

[10] *See* National Council on Disabilities Report, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind* (Jan. 25, 2000) ("NCD Report").

[11] *See Id.* at 12.

[12] 20 U.S.C. § 1418.

[13] The preferred term, English language learner (ELL) is used instead of the term used in the law, "limited English proficient" (LEP). Both refer to students acquiring English as a second language.

[14] National Research Council, *High Stakes Testing for Tracking, Promotion and Graduation*, at 93 (National Academy Press 2000).

[15] *See* Beth Harry, Janette Kingner, Keith M. Sturges, and Robert Moore, *Of Rocks and Soft Places: Using Qualitative Methods to Investigate the Processes that Result in Disproportionality ("Rocks and Soft Places"); see also* National Research Council, *High Stakes Testing for Tracking, Promotion and Graduation*, at 93 (National Academy Press 2000) ("High Stakes").

[16] *See Rocks and Soft Places.*

[17] *See* Donald P. Oswald, Martha J. Coutinho, and Al M. Best, *Community and School Predictors of Over Representation of Minority Children in Special Education*, slated for publication by the Harvard Education Publishing Group ("*Predictors*").

[18] *Id. See* Parrish. *See also Examination.*

[19] *See, e.g.*, U.S. Department of Education, *Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (1998).

[20] *See* Parrish; *Predictors; Examination.*

[21] *See Predictors; see also* Alfredo Artiles, Robert Rueda *et al.*, *Factors Associated with English Learner Representation in Special Education: Emerging Evidence from Urban School Districts in California ("Factors Associated").*

[22] *Examination.*

[23] *Factors Associated.*

[24] David Osher, Darren Woodruff, and Anthony Sims, *Exploring Relationships Between Inappropriate and Ineffective Special Education Services for African American Children and Youth and their Overrepresentation in the Juvenile Justice System* ("Exploring Relationships").

[25] *See Predictors.*

[26] Jay Heubert, "High States Testing: Opportunities and Risks for Students of Color, English-Language Learners, and Students with Disabilities" (forthcoming as a chapter in *The Continuing Challenge: Moving the Youth Agenda Forward* (M. Pines ed.)) *Policy Issues Monograph* 00-02, Sar Levitan Center for Social Policy Studies (Baltimore, MD: Johns Hopkins University Press) [on file with author] ("High Stakes").

[27] *See* William Taylor, "Standards, Tests and Civil Rights," *Education Week* (Nov. 15, 2000).

[28] 20 U.S.C. § 1412 (a)(16), (17); 20 U.S.C. § 6311(b)(3)(I), 6314 (b)(2).

[29] National Center on Educational Outcomes, *1999 State Special Education Outcomes: A Report on State Activities at the End of the Century* (Dec. 1999), available at *<http://www.coled.umn.edu/nceo/OnlinePubs/99StateReport.html>* ("NCEO Report").

[30] *Id.*

[31] *See* Julie Miller, "Five More States Ordered to Negotiate Compliance Agreeements on Assessment," *Title I Report*, at 11 (July 2001).

[32] 20 U.S.C. § 6311(b)(3)(I); 20 U.S.C. § 1412 (a)(16), (17).

[33] Not currently required for accountability purposes under Title I.

[34] NCEO Report.

[35] According to data available on the website of the Texas Education Agency (TEA), more than 12% of all Texas children are eligible for special education services. Based on a review of data from previous years, this percentage represents a significant increase of nearly 100,000 students between 1993-1994 and 1999-2000 - a change from 10.7% of those enrolled to 12.1%.

Total enrollment grew during the same period by nearly 350,000 students. *<http://www.edweek.org/context/states/tx-facts.htm>*.

[36] *See* Scott Thompson, "The Authentic Standards Movement and Its Evil Twin," *Phi Delta Kappan* (2001).

[37] Martha Thurlow and Kristen Liu, *State and District Assessments as an Avenue to Equity and Excellence for English Language Learners with Disabilities* (paper presented at CRP Conference, on file with author).

[38] *Id.*

[39] High Stakes.

[40] Hehir.

[41] Parrish.

[42] 42 U.S.C. § 2000(d)(1)-(4) (1994).

[43] 29 U.S.C. § 794.

[44] 42 U.S.C. § 12101 *et seq.* (1994). Title II of the Americans with Disabilities Act (ADA) prohibits discrimination because of a person's disability in all services, programs, and activities made available by any public entity. *Id.* at § 12132.

[45] Important differences do exist, but they are not relevant to this discussion. *See, e.g.*, U.S. Commission on Civil Rights, III, Equal Education Opportunity Project Series 89 (1997) ("EEOP Volume III").

[46] 20 U.S.C. § 1412.

[47] *See, e.g.*, 20 U.S.C. § 1401(8); 1414 (b-d); 34 C.F.R. § 300.26 (b)(3), 300.344(a)(2), (4)(ii), 300.347, 300.532(b), 300.533(a)(2)(ii), §300.550-554; see also *Devries v. Fairfax Count School Board*, 882 Federal Reporter 2d 876, 878 (4th Circuit 1989).

[48] 20 U.S.C. § 1412(a)(1).

[49] 20 U.S.C. § 1412(a)(5).

[50] There is some disagreement as to whether the LRE entitlement is a right wholly subsumed by FAPE or a separate right. Courts tend to seek a balance when the two are in tension. *See, e.g., Oberti v. Board of Education of the Borough of Clementon School District*, 995 Federal Reporter 2d 1204 (3rd Circuit 1993); *Daniel R.R. v. State Board of Education*, 874 Federal Reporter 2d 1036 (5th Circuit 1989).

[51] In *Oberti*, the 3rd Circuit Court held that the school district has the burden of proving compliance with LRE requirement, regardless of which party brought the claim in court. See *Oberti v. Board of Education of the Borough of Clementon School District*, 995 Federal Reporter 2d 1204 (3rd Circuit 1993).

[52] 20 U.S.C. § 1412(a)(5). Specifically, the law states: "[S]pecial classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature of severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

[53] 20 U.S.C. § 1401(c)(4).

[54] 20 U.S.C. § 1401(c)(5).

[55] Public Law No. 105-17, § 602(A)-(B) (1997) (eligible categories of disability are listed in the law).

[56] *See* 42 Federal Register 22, 685 (1977).

[57] 29 U.S.C. § 705(20)(B), 794; 34 C.F.R. §104.3 (j).

[58] 29 U.S.C. § 794. However, courts have been split with regard to legal claims based on FAPE.

[59] Certain procedural protections would still apply, however. Moreover, IDEA requires districts to ensure the use of assessments that are neither racially nor culturally biased. 20 U.S.C. § 1414 (b)(3)(A)(i).

[60] Imagine a misidentified student who suffered psychological harm and was denied access to the regular education curriculum for years in an inappropriate isolated placement. In some cases these new needs may qualify thus harmed students for FAPE under the broader, non-categorical section 504 disability definition, such as "otherwise health impaired." For more information on the differences, *see* U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, at 98, EEOP Volume II (Sept. 1997).

[61] *See* 34 C.F.R. § 104.3(j)(2)(iii) (emphasis added).

[62] 34 C.F.R. § 104.3(j) (1996).

[63] *See* Memorandum from Assistant Secretary of Education Norma Cantu, *Minority Students and Special Education* (July 6, 1995) (on file with author). *See also* EEOP volume III.

[64] 34 C.F.R. § 100.3(b)(2). Title VI, section 602, "authorizes and directs" federal departments and agencies that extend federal financial assistance to particular programs or activities "to effectuate the provisions of section 2000d [section 601] . . . by issuing rules, regulations, or orders of general applicability" (42 U.S.C. § 2000d-1). Similar "effects test" regulations exist with regard to discrimination on the basis of disability (section 504), 34 C.F.R. § 104.4(b)(4) and gender (Title IX) 34 C.F.R. § 106.1, *et seq.* These gender and disability protections may also be germane to a minority overrepresentation case under "disparate impact" legal theory. Title IX, for instance, could be violated where males are disparately impacted by a school district's referral, evaluation, and placement policy.

[65] Telephone Interview with Barbra Shannon, OCR Senior Attorney (May 15, 2000).

[66] *See, e.g., Powell v. Ridge*, 189 Federal Reporter 3d 387 (3d Circuit 1999); *Elston v. Talladega County Board of Education*, 997 Federal Reporter 2d 1394, 1407 (11th Circuit), *rehearing denied*, 7 Federal Reporter 3d 242 (11th Circuit 1993).

[67] *Id.*

[68] *See, e.g., GI Forum v. Texas Education Agency*, 87 Federal Supplement 2d 667 (W.D. Texas 2000).

[69] NCD Report at 48.

[70] *See* EEOP Volume III at 98-109.

[71] *See Ceasar v. Pataki*, 2000 WL 1154318, (S.D.N.Y. 2000) (upholding claim that state's failure to act in accordance with legal enforcement mandates if such inaction has disparate impact on minorities was actionable offense under Title VI regulations).

[72] For 2000, compliance data was collected from nearly every school district in the U.S.

[73] Unlike the Title VI analysis, OCR's section 504 analysis is typically *not* a disparate impact analysis. In part, this is because failures to follow numerous legal procedures delineated in disability law are considered *per se* discrimination and are relatively easy to establish. *See* EEOP Series, U.S. Commission on Civil Rights.

[74] *See* U.S. Commission on Civil Rights, 1 Equal Educational Opportunity Project Series, at 209-213 (1996).

[75] *See* U.S. Department of Education, Office for Civil Rights, *Enforcement and Other Activities in the Area of Over-representation of Minorities in Special Education*, outline of presentation for The Conference on Minority Issues in Special Education, by Tim Blanchard, OCR National Minorities and Special Education Network Co-Facilitator (Nov. 17, 2000). During

this same period, 1993-2000, the agency reports receiving 309 complaints "with MinSPED allegations."

[76] *See* Theresa Glennon, *OCR and the Misplacement of African American Students in Special Education: Conceptual, Structural, Strategic and Administrative Barriers to Effective Enforcement* (CRP Conference; ("Glennon").

[77] *Id.*

[78] Based on several discussions with Timothy Blanchard and Algis Tamosciunus, the co-facilitators of the OCR's "MinSPED" task force on the overrepresentation of minorities in special education..

[79] Memorandum from Norma Cantu on Minority Students and Special Education to all staff, at 19 (July 6, 1995).

[80] *Id.*

[81] *Id.*

[82] Telephone Interview with Timothy Blanchard (Sep. 25, 2000).

[83] Glennon.

[84] *Id.*

[85] *Id.*

[86] *See* Glennon.

[87] For a clear and more complete description of the IDEA enforcement scheme *see* NCD Report at 37 (Table 1).

[88] Most notable was Congress' bipartisan reauthorization and amendment of the Elementary and Secondary Education Act, calling it "The Improving America's Schools Act" (Title I of this Act is hereinafter referred to simply as Title I). The 1994 Act emphasized maximum access to regular education for all students. It required that states align their curriculum and assessment with high academic standards and test all children practicable. Most important, Title I required states report data to the public, disaggregated by race, ethnicity, and gender, and compare the achievement of students with disabilities with their nondisabled peers. 20 U.S.C. § 6301 *et seq.*

[89] *See* 34 C.F.R. § 300.146 (a)-(b); 20 U.S.C. § 1412(a)(22).

[90] 20 U.S.C. § 1412(a)(16)(c) (1997); 34 § 300.755 (1999).

[91] *See* 20 U.S.C. § 1418(c); 34 C.F.R. § 300.755.34; C.F.R. § 300.519; 20 U.S.C. § 1415(k). This responsibility could alternatively fall to the Secretary of the Interior, "as the case may be." *Id.*, § 1418(c)(2).

[92] *See generally* NCD Report. The report looks at more than two decades of federal monitoring and enforcement of compliance with Part B of IDEA.

[93] *See Examination.*

[94] NCD Report at 113. The Report goes on to say that 70% noncompliance is probably too low, based on its independent review of OSEP noncompliance determinations. *Id.* at 118.

[95] Hehir.

[96] For more information on OSEP's monitoring visit the following website: *<http://www.dssc.org/frc/monitor.htm>.*

[97] Hehir.

[98] 20 U.S.C. § 1234(c)(a)(3) Compliance Agreement; 34 C.F.R. § 80.12 Special Conditions; 20 U.SC. § 1416, 1234(a)(1), (d) Witholding (1416 includes power to withhold funds from particular local education authorities); 20 U.S.C. § 1416 Referral to Department of Justice; 20 U.S.C. § 1234 (c)(a)(2), (e) Cease and Desist Order.

[99] NCD Report at 9,53.

[100] 20 U.S.C. § 1412(a)(16)(B).

[101] No Child Left Behind Act of 2001, Public Law No. 107-110, § 1111(b)(2)(C)(vi) ("ESEA 2001").

[102] Presented at the Harvard Graduate School of Education in Jan. 2001.

[103] *See, e.g., Yonkers v. Board of Education*, 624 Federal Supplement 1276 (S.D.N.Y. 1985).

[104] The consent decrees consist of two documents in each case: (1) an order approving the consent decree on statewide special education issues, *Lee v. Phoenix Board of Education*, C.A. No. 70-T-854 (M.D. Alabama 2000); and (2) the consent decree itself, *Lee v. Phoenix Board of Education* (M.D. Alabama 2000).

[105] The decrees, taken together, apply to the entire state.

[106] Jeremy D. Finn, *Patterns in Special Education Placement as Revealed by the OCR Surveys* (1982).

[107] *Rocks and Soft Places.*

[108] Hehir.

[109] *Exploring Relationships.*

[110] *Corey H. v. The Board of Education of Chicago* et al., 21 IDELR 713 (N.D. Illinois 1998). *See also* Soltman and Moore.

[111] ESEA 2001.

[112] To the extent that IDEA and 504 require race neutral evaluation and placement, there may be a basis for seeking remedial measures that specifically redress racial overrepresentation in special education.

Chapter 19

Blueprint for Gender Equity in Education

by Verna L. Williams

Introduction

Promising to "leave no child behind," the Bush Administration has proposed a number of initiatives designed to improve the quality of the nation's schools. Key to realizing that important goal — but missing from the proposal at this writing — are elements to ensure that sex discrimination is not a barrier to educational opportunities. Far too many young women and girls continue to encounter sexual harassment at every level of school, biased and misused testing for high stakes decisions, or outright hostility to their entrance into areas deemed inappropriate for them, such as math, the sciences, and technology, among others. As the new administration begins to implement its agenda for holding schools accountable for the education they provide to the nation's children, it should commit to addressing the persistent and damaging gender inequalities that preclude opportunities for so many young people. The following outlines the elements that are essential for assuring that the educational horizons of our boys and girls are not limited by sex discrimination.

I. New Tools for Administrative Enforcement

The Clinton Administration took several important steps to enhance enforcement of Title IX of the Education Amendments of 1972,[1] the law that prohibits sex discrimination in any federally funded education program or activity: issuing model Title IX regulations that apply to the executive branch agencies that fund education programs or activities and an prohibiting discrimination based on sex and other bases in any federally conducted education program. The Bush Administration should build upon these developments to ensure that Title IX's mandate of equal educational opportunity is realized.

A. Title IX Regulations for Executive Branch Agencies

Although Title IX requires any federal agency that funds education programs or activities to issue regulations to enforce the statute, only four agencies — the Departments of Education, Energy, Agriculture, and Health and Human Services — had done

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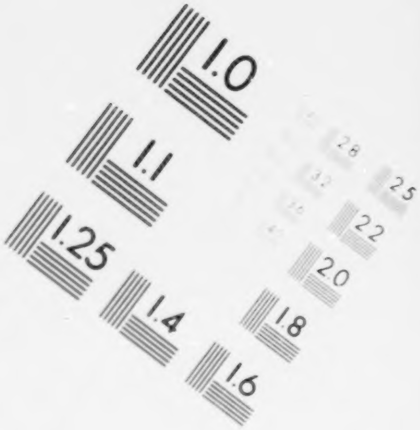
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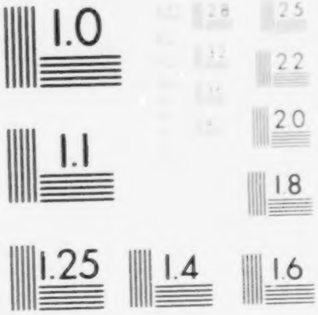
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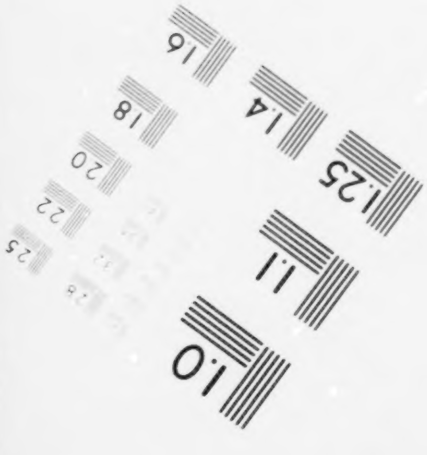
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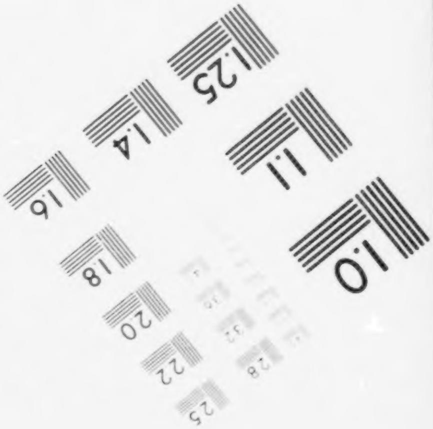
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MANUFACTURED TO AIIM STANDARDS
BY APPLIED IMAGE, INC.

so until last year, almost 30 years after Title IX's enactment. We recommended that the Clinton Administration address this serious lapse and, in August 2000, 20 federal agencies finally issued regulations to implement Title IX, modeled on the regulations first issued by the Department of Education in 1975.[2]

With these new regulations, federal executive branch agencies now have the means to enforce Title IX's prohibition against sex discrimination. The new administration should commit to ensuring that the agencies make use of these tools in the myriad education programs that the federal government funds. Specifically, we renew our recommendation that the Department of Justice, through its authority to coordinate enforcement of the civil rights laws, take strong, proactive steps to ensure that the agencies enforce the new regulations vigorously. For example, the Department should provide training and litigation support and work with the various agencies to implement their plans for Title IX enforcement.

B. Executive Order No. 13160

Similarly, a new executive order issued in June 2000 provides additional assistance for assuring gender equity in education. Executive Order No. 13160 prohibits discrimination based on sex, race, national origin, among other characteristics, in any education program or activity the federal government conducts.[3] This mandate applies to federally administered programs such as scholarships and fellowships that provide important educational opportunities for students such as the National Science Foundation's scholarship program. With this new Order, the federal government now will be held accountable for complying with the nation's anti-discrimination laws. The Bush Administration should commit to ensuring that the terms of this executive order are carried out.

II. Enforcement in Key Areas by the Department of Education

A. Athletics

Title IX enforcement has been critical to the significant advancement female athletes have made over the almost 30 years since the statute's passage. Before Title IX, fewer than 300,000 girls took part in interscholastic athletics; and fewer than 32,000 women played intercollegiate athletics. Now 2.65 million girls participate at the secondary school level, while 163,000 take part at the college level. Unfortunately, however, the field is far from level for too many girls and women who seek opportunities to play sports. For example, while women represent over half of all undergraduates, they still receive only 40% of the athletic participation opportunities, 41% of the athletic scholarship monies, 33% of the athletic operating budgets, and 30% of the recruiting dollars. At the high school level, while no data are maintained, anecdotal evidence indicates that substantial disparities exist. For example, the *Atlanta Journal-Constitution* ran a series of articles showing that female high school athletes were relegated to muddy fields and port-a-johns, while their male counterparts had state-of-the-art stadiums. Not surprisingly, the *Journal-Constitution*'s report revealed that school districts routinely spent significantly less on girls' sports than on boys' athletics: one county budgeted more than 81% of its resources for male athletes.[4]

Several steps should be taken to address the ongoing problems in athletics. We recommend that the Office for Civil Rights

(OCR) conduct targeted compliance reviews to ensure that female students are getting their fair share of athletic opportunities in educational institutions. Additionally, the Department should make sure that data concerning college and university athletics collected pursuant to the Equity in Athletics Disclosure Act (EADA) be made available centrally at the Department and that it be posted on the Internet for ease of access to the information. Finally, Congress should pass a law similar to the EADA that would apply to secondary schools to assist in identifying and remedying problems.

B. Career Education

OCR also should focus its attention on enforcing Title IX's mandate in career education — that is, School-to-Work, vocational education, career academies, and other job training programs — where ingrained patterns of sex segregation and sex discrimination persist. Female students remain concentrated in programs that prepare them for traditionally female, and low-paying, jobs in fields like health care, child care, clerical work, and the service industry. And male students still dominate the programs that prepare them for the high-wage skilled trades jobs. Now, however, as the new economy expands, and with it, the need for students to acquire skills in math and science, these disparities have serious implications for the many female students who do not pursue nontraditional areas.

Specifically, female students are dramatically underrepresented in courses that can open the doors to the high-tech careers of the new economy, and, as a result, lack the training necessary for jobs that lead to economic security. In high school, young women are significantly less likely to take classes in computer programming or applications. They are only 9% of the students taking the higher level Advanced Placement computer science exam. In associate degree programs, men are six times as likely to major in engineering or science technology; in bachelor's degree programs, women receive only about one-third of the degrees in mathematical and computer sciences. In high schools, predominantly male programs, such as electrical and automotive repair, are being updated with high-technology courses and programs, while predominately female programs have barely changed. Additionally, students in predominantly female vocational schools appear to have fewer opportunities to take advanced-level math and science classes.

While some would claim that young women are not interested in these areas, the truth is that discrimination dissuades too many female students from pursuing nontraditional areas: counseling that steers them away from technology courses, instruction that leads to different and less challenging assignments for young women in traditionally male programs, or sexual harassment from male peers who feel that women just don't belong, for example. This discrimination has implications for young women's future earning potential. Technical education programs and training for the skilled trades can mean the difference between making a real living and just getting by. For example, the median income of a chemical engineer in 1998 was over $64,000 in 1990, compared to that of a preschool teacher, which was only $17,310. Access to technology programs clearly translates into access to economic security for young women.

OCR should conduct targeted compliance reviews in the many sex-segregated programs in schools across the country to identify and address the issues that preclude young women from pursuing educational opportunities in technology, the sciences, and other areas deemed nontraditional for them. Additionally, OCR should provide these schools with guidance as to how to ensure that nontraditional areas are not hostile environments for female students.

C. Testing

OCR should build upon efforts to ensure that standardized tests are not misused in such a way as to deny students educational opportunities. Since testing has emerged as a cornerstone in education reform efforts, including the President's proposal, great care needs to be taken in order to address gender differentials in test scores prevalent in so many widely used standardized tests.

Disparities have been well-documented particularly regarding two categories of standardized tests: (1) admissions tests for higher education; and (2) tests used for vocational and career education program selection, placement, and career counseling. With respect to post-secondary admissions tests, female students have consistently scored lower than male students. For example, the results from the 1999 SAT show that the gender gap is now 43 points. The test score gap on the math section of the SAT is particularly startling — female test-takers averaged a score of 495 while male test-takers averaged a score of 531. This gender gap persists within racial and ethnic groups as well: on average, in 1999, African American females scored 16 points less than their male counterparts; Asian American females scored 45 points less than their male counterparts; and Mexican American females scored 46 points less than their male counterparts.[5] The implications of this persistent and widespread gap are great, given that it has been well-documented that the SAT underpredicts academic performance for female students. Therefore, the use of this test for purposes such as admissions and determining scholarship awards effectively denies many female students access to educational opportunities.

With respect to vocational education, it is well-documented that sex-segregation is a persistent problem. The Title IX regulations and 1979 vocational education guidelines require that when tests are used in connection with a vocational program, they must be validated as essential to that program.[6] However, there have been few efforts to validate vocational tests, such as the Armed Services Vocational Aptitude Battery (ASVAB), in the secondary school setting. The ASVAB is administered to about 20% of high school juniors and seniors throughout the United States. It is used by about 60% of American high schools as part of a Defense Department-sponsored "Career Explorations Program," run through the Defense Manpower Data Center (DMDC). However, a recent U.S. General Accounting Office (GAO) report concluded that the ASVAB posed a systemic barrier for women, who after taking the test remain clustered in traditional areas for their sex, such as health care, administration, personnel, and sup-ply occupations.[7] Thus, the continued use of the ASVAB in the secondary setting is to the detriment of girls in vocational programs.

As the use of standardized tests has begun to claim a major role in the education reform movement, little attention has been paid to the gender impact of these tests. The challenge, then, is to ensure that increased test use at all levels of education does not limit opportunities for particular groups of students, and especially women and people of color, because we have not taken the time to examine the use of these tests carefully.

In December 2000, OCR issued *The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers*, which provides institutions with some guidance as to the appropriate use of testing. The Resource Guide sets out important legal principles regarding the use of tests, including ensuring that a test not be the sole criterion for an educational decision. OCR should make use of this Guide and the principles articulated in it to ensure that female students are not disadvantaged by the misuse of standardized tests.

D. Sexual Harassment

The Bush Administration also should build upon existing efforts to combat sexual harassment in the nation's schools. Specifically, in January 2000, the Department of Education's Office for Civil Rights issued supplemental guidance on sexual harassment[8] in light of the Supreme Court's decisions in *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*. Under those decisions, recipients can be liable in monetary damages for sexual harassment when an appropriate school official has actual notice of sexual harassment, but responds to it with deliberate indifference.[9] The OCR guidance explains these standards and informs recipients of the standard that applies for administrative enforcement, which is grounded in the Title IX regulations. Under this standard, recipients may be found out of compliance with Title IX in cases of employee-student harassment when the harassment occurs in the course of the employee's providing aid, benefits, or services to students, irrespective of whether the institution had notice of the harassment. In cases of student-to-student harassment, recipients may be out of compliance with Title IX if they knew or should have known about the harassment but failed to take prompt, remedial steps to address it.

OCR should take steps to ensure that recipients across the country are aware of the updated guidance, the standards that apply, and take proactive steps to ensure that they are complying with it. For example, OCR should conduct targeted compliance reviews to ensure that institutions have policies and procedures in place to address complaints of sexual harassment.

III. Reauthorization of the Elementary and Secondary Education Act

The foregoing are just some of the steps the Bush Administration should take to promote gender equity in educational institutions. It should be added that the 2001 reauthorization of the Elementary and Secondary Education Act (ESEA), the main federal law that addresses elementary and secondary education in this nation, also presents an opportunity to address these issues. For example, the President's proposal includes a provision to "enhance education through technology."[10] While providing funding to states targeted for bringing technology to the classroom is one way to bridge the growing digital divide affecting low-income students, efforts are needed to address the growing gender gap in this area described above, such as requiring state educational agencies to keep and send to the Department of Education data disaggregated by race, gender, and ethnicity, concerning the number of students pursuing such courses. Similarly, the proposal relies on testing of students to hold schools accountable for the education they provide. In light of the well-known abuses of standardized tests, the administration's proposal should include safeguards to ensure that the tests developed for the purpose of assessing states' progress are not used to make high-stakes decisions about students. The proposal also should include sexual harassment among the ills to be addressed in its efforts to encourage safe schools.[11] In this connection, states should gather and provide to the Department of Education data disaggregated by race, sex, and ethnicity concerning sexual harassment complaints institutions receive and how they are resolved. Finally, the proposal does not include a provision to reauthorize the Women's Educational Equity Act (WEEA). Established in 1975, WEEA is the only federal program that focuses specifically on increasing educational opportunity for women and girls. Since its inception, WEEA projects have been on the forefront of addressing the myriad of barriers to education facing our nation's daughters: sexual harassment, biased standardized testing, tracking of girls into traditional low-paying careers, among others. Because WEEA projects have developed strategies to overcome those barriers and encouraged girls and young women to achieve, continued funding of this program is critical to efforts to achieve gender equity.

IV. Conclusion

Much work remains to ensure that the promise of Title IX is realized in educational institutions across this country. With the new tools developed in the previous administration and new case law, the Bush Administration has an opportunity to make significant inroads in making gender equity a reality.

Endnotes

[1] 20 U.S.C. § 1681–1688 *et seq.*

[2] "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Common Rule," 65 Federal Register 52857 (Aug. 30, 2000).

[3] "Executive Order No. 13160 of June 23, 2000," 65 Federal Register 39775 (June 27, 2000).

[4] Mike Fish and David Milliron, "The Gender Gap: A Special Report," *The Atlanta Journal-Constitution*, Dec. 12, 1999, at 1.

[5] See The College Board, *1999 Profile of College-Bound Seniors — National Report.*

[6] See 34 C.F.R., Part 100, App. B (IV)(K).

[7] See Norman J. Rabkin, *Gender Issues — Trends in Occupational Distribution of Military Women*, GAO/NSIAD-99-212 (Sep. 14, 1999).

[8] "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties," 66 Federal Register 5512 (Jan. 19, 2001).

[9] *Davis v. Monroe County Board of Education*, 526 U.S.C. § 629, 642 (1999); *Gebser v. Lago Vista Independent School District*, 524 U.S.C. § 274, 290 (1998).

[10] "No Child Left Behind" at 22.

[11] *Id.* at 20.

Chapter 20

The Progress and Proposals for a Civil Rights Agenda in the Communications Policy Arena

by Mark Lloyd[1]

Introduction

This is a report on the progress of and threat to civil rights principles at stake in the making of communications policy. It is an honor to make such a contribution to the Citizens' Commission on Civil Rights biannual report on federal civil rights and enforcement. It may even come as a surprise to the reader that a contribution focused on communications policy is included in this report. Popular discourse (as offered, for example, in the pages of *The New York Times*) does not necessarily admit that any set of principles has an impact on communications, other than fairly limited views of the First Amendment, technology, and the market.

Occasionally, a small community of activists who focus on market failures and consumer protections are able to participate in the debate over communications policy. However, these public interest advocates tend to focus on "consumer" issues (Is the consumer being overcharged for the service she receives? Is information about the consumer being used improperly? Does the consumer have access to a product?), rather than issues of equality and democratic accountability. While these advocates have much in common with civil rights advocates, their concerns are distinct. This paper then is also an argument that the arena of communications is, and should be, informed by the deeply rooted considerations of civil rights advocacy.

Communications policy encompasses a very large field of activities that touch on civil rights concerns. These activities include employment, ownership, the deployment of service, federal licensing of public property, privacy, access to government information, public participation in government rulemaking, the accountability of publicly supported institutions, and other areas. This paper will not provide a comprehensive look at all of the civil rights considerations in the communications policy arena. It will only provide a brief assessment of a few key communications policy considerations handled during the Clinton Administration. We will focus on equal employment opportunity and ownership, and the deployment and support for advanced telecommunications services.

It may also be useful to note at the beginning that these particular concerns are the province of an independent agency, the Federal Communications Commission (FCC). The FCC is a relatively small administrative agency led by five commissioners appointed by the President with the consent of the Senate. Two commissioners are chosen from the Democratic party, two are chosen from the Republican party, and the Chairman is usually from the party of the President. Over the past four years, the FCC has been led by its first African American

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Chairman, William E. Kennard, a Democrat, and it was the first FCC with members of minority groups to hold the majority of votes (three), Kennard, Gloria Tristani, and Michael Powell. Kennard, Tristani, and Susan Ness were the Democrats on that commission. Powell and Harold Furtchgott-Roth were the Republicans.

In 2001, the FCC was led by Michael Powell. All of the other commissioners left at the end of their terms, or resigned. The Powell Commission is comprised of Republicans Kathleen Q. Abernathy, Kevin J. Martin, and Democrat Michael J. Copps. As of this writing, Jonathan S. Adelstein, a legislative assistant to Senate Majority Leader Tom Daschle, is the odds-on favorite to be selected as the second Democrat.

The FCC is funded by an annual appropriation from Congress. And, perhaps as important, its charge is to establish regulations under authority of statute. Five short years ago, in light of sweeping technological developments in the communications arena, there was a sweeping revision of the 60-year-old Communications Act. Much of what follows will examine the Kennard FCC's implementation of the 1996 Telecommunications Act with a focus on those provisions designed to further the equitable deployment of telecommunications services.

In brief, I make the following proposals:

- The next administration, under either the Federal Communications Commission or a combination of agencies, such as a task force comprised of the National Telecommunications and Information Administration (NTIA), Small Business Administration (SBA), and the FCC, should conduct a Croson/Adarand analysis to determine whether there is any justification to employ race-based measures to advance Equal Employment Opportunity regulations and efforts to increase minority ownership in the communications industry.

- The next administration should review the impact of the relaxed ownership rules in radio on both minority ownership opportunities and the service to minority communities. It should also review whether federal small business loans are sufficient to allow underrepresented groups to participate in the market for communications companies.

- The next administration should continue its efforts to improve access to telecommunications service on Indian land. A yearly review should be conducted to determine whether these efforts are working.

- The FCC, perhaps in concert with other federal agencies, such as the Departments of Housing and Urban Development, Health and Human Services, Education, Agriculture, and the Interior, should devote more resources to inform those eligible for Lifeline and Link Up support.

- The E-Rate program, which subsidizes the telecommunications capability of schools, libraries, and rural health care centers, should be continued.

- The next administration should keep its promise to invest $400 million to create and maintain more than 2,000 community technology centers in low-income neighborhoods by 2002.

- The next administration should determine with better accuracy whether deployment of advanced telecommunications services occurs in a way that avoids poor and minority communities. Once we have better information we can deter any possible information redlining by informing private decision-makers about the true value of minority markets receptive to advanced services, encouraging state or municipal deployment in underserved markets, or providing private industry with incentives to deploy in those markets.

These actions will help to ensure that minorities and the poor will have equal access to the public airwaves and the National Information Infrastructure.

I. The Past Is Not Even the Past

That civil rights issues claim a place in the debate over communications policy should not be a surprise. There is an all-too-often-ignored historical relationship between the modern civil rights movement and communications policy. It is arguable that the starting point of the so-called public interest movement related to communications began in the early 1960s at the National Arts Club in New York City, with a conversation held by three civil rights leaders: Martin Luther King, Jr., Andrew Young, and Everett Parker.

Dr. King wanted Parker to do something about the television stations in the south. King was particularly concerned about the practices of television stations licensed to serve communities in Alabama. Among the practices that concerned King and other civil rights leaders was the regular local termination of the network signals whenever a program was transmitted about the "Negro Movement." Instead of an interview with Dr. King or Thurgood Marshall, southern viewers were often entertained with a sign which read: "Sorry Cable Trouble." In addition, many stations, particularly in the south, did not broadcast local issues of concern to blacks, did not employ blacks, and did not allow blacks to advertise on their station. As Kay Mills writes in *Changing Channels: The Civil Rights Case that Changed Television*, the actions of these federal licensees with control over public property were as much civil rights issues as was the segregation of passengers by bus companies that traveled on interstate highways.[2]

After a tour of the south, Parker decided to focus his attention on stations in the state capitol of Mississippi. In Jackson, Parker joined forces with local NAACP and civil rights activists, most notably Aaron Henry and Robert L. T. Smith, to challenge two network affiliates (WLBT — the NBC affiliate, and WJTV — the ABC affiliate) and ultimately the FCC.

The coalition lost their challenge to the Jackson stations' licenses at the FCC in May 1965. Later that summer, the Reverend Dr. Everett C. Parker filed suit against the FCC in the U.S. Circuit Court of Appeals for the District of Columbia. The Office of Communications of the United Church of Christ argued that the white-only programming of the stations violated the Fairness Doctrine and was not "in the public interest" of either black or white viewers in Jackson, Mississippi. The FCC argued that citizens did not have the right under the law to challenge a station's license or the FCC's decision. In 1967, the Appeals Court, in an opinion by Warren Burger, overruled the FCC. That ruling ultimately led to the loss of WLBT's license, and perhaps more important it gave all citizens a right to enforce the obligation that federal licensees were to operate in the public interest — and that meant all of the public, even minority groups.[3]

Because it recognized the civil rights of viewers in relationship to both the industry and the federal agency that regulates the industry, the *United Church of Christ* decision has been characterized by one historian as the "Magna Carta for active public participation in broadcast regulation."[4] This renewed civil rights focus on broadcast stations led the Kerner Commission to examine the role of media in exacerbating the racial tensions that ultimately resulted in the widespread urban rioting in the late 1960s. The Kerner Commission warned that television stations "have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States . . . The world that television and newspapers offer to their black audience is almost totally white. . . ."[5]

While federal regulation of all communications industries has always referred to the necessity of broadcasters (radio and television stations) and common carriers (telegraph and telephone companies) to operate "in the public interest,"[6] it was not until the involvement of the civil rights community, through protest and court action, in the late 1960s and 1970s that the public had any real say about its interest. Though many advances were made during this period, much was reversed in the mid-1980s and 1990s. The next few years may determine whether the setbacks of the past 20 years will be reversed or solidified as we enter a future where communications becomes more important than ever to our society.

II. EEO and Ownership

One direct outcome of both the Kerner Commission and the *UCC v. FCC* focus on the lack of service to minority communities was the establishment of equal employment opportunity guidelines.[7] The FCC is charged with regulating "interstate and foreign communications services so that they are available, so far as possible, to all people of the United States, without discrimination the basis of race, religion, national origin, or sex."[8]

However, the FCC required more of broadcasters (and cable entities) than simply refraining from discrimination. In order to demonstrate that a broadcast licensee had met its responsibility to serve in the public interest, broadcasters were required to "carry out a positive continuing of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice."[9] Those provisions called for an accounting of minorities and women employed at the stations and asked the stations to compare the numbers of minorities and women on staff to the number of minorities and women in the station's service area. The FCC also asked stations to send job announcements to places where likely candidates might be found.[10]

The FCC rationale for requiring a report of hiring statistics and outreach efforts was twofold: (1) hiring without broad outreach may exclude minority and women candidates; and (2) a licensee who discriminates against minorities and women would not be inclined to serve the needs and interests of all sectors of its community of license.[11]

A. Lutheran Church

In 1998, the U.S. Court of Appeals ruled that the FCC's EEO reporting and outreach rules were an unconstitutional violation of equal protection.[12] Judge Silberman considered the requirement to report on minority hiring as a condition of the broadcast license to be a race-based government hiring program triggering "strict scrutiny." Noting *Adarand v. Pena*, 515 U.S.C. § 200, 226 (1995), Judge Silberman wrote:

> *We do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and*

> *surely will result in individuals being granted a preference because of their race.*

Judge Silberman went on to write that even if the Supreme Court's decision in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) was good law, that court's finding that diversity was "important" was not a determination that it was "compelling." Moreover, the remedy (outreach and reporting on staff composition) is not narrowly tailored, as there was no evidence "linking low-level employees to programming content."[13]

In response to *Lutheran Church*, the FCC froze enforcement of its EEO regulations. After the *Lutheran Church* decision, several studies on employment in the broadcast industry demonstrated that minorities were not especially well represented. In January 1999, a coalition of minority organizations also began a protest against the program schedules of the national networks, which featured mainly white actors. The Center for Media and Public Affairs, Children Now, and the Tomas Rivera Institute provided studies that supported the claims of underrepresentation.[14] And a yearly study released by the Radio-Television News Directors Association, for example, finds that minorities are underrepresented in television news staffs, and that few minorities were in a position to determine either news or news hires.[15] After months of embarrassing headlines, and threats of boycotts ("black-outs" and "brown-outs"),[16] most of the major networks announced agreements to put more minorities on the air and improve hiring practices.[17]

In January 2000 the Commission issued modified EEO requirements for broadcast and cable operations. Those rules required broadcasters to widely disseminate information about job openings, place information detailing outreach efforts in their public file, and submit a statement of compliance with the FCC's EEO rule. In addition, broadcasters with ten or more full-time employees must submit their annual EEO report, but these reports will not be used to determine fitness to serve as a public trustee, they will be used "only to monitor industry employment trends and reporting to Congress."[18]

David Honig, who filed extensive briefs at both the Appeals Court and the FCC as counsel for the Rainbow/PUSH Coalition, the NAACP, and the Minority Media and Telecommunications Council, argued, "The effect of this ruling is that broadcasters understand that if you discriminate, you are going to lose your license." He also said, "These are the best recruitment rules we can probably hope for."[19] While the first statement is highly unlikely, the second is undoubtedly true.

The fundamental premise of the FCC in adopting equal employment opportunity rules to apply to federal licensees remains sound. Local broadcasters play an important and unique role in community discourse. They are given a license to a scarce portion of the public electromagnetic spectrum by the federal government. In that public space they are protected by the federal government from interference by others. They are also given special "must carry" rights over local cable operations.[20] Local broadcasters are the most relied upon source for news, political discussion, and emergency information.[21] In exchange for their special status in our communities, broadcasters are, in theory, required to act as public trustees, providing free over-the-air service for the public good of all segments of their community of license. Congress, the FCC, and the Supreme Court have recognized a link between broadcast employment and the expression of views on that broadcast station.[22] But today, as was the case in the mid-1960s, the gift of this scarce, protected, powerful federal license is not tied to any demonstration that the licensee employs on a nondiscriminatory basis.

Moreover, weak EEO guidelines for broadcasters will undoubtedly not stop at small radio stations such as the one operated by the Lutheran Church Missouri Synod. EEO rules applied to broadcasters and to cable operations alike. And in our new digital environment, similar rules will likely be extended to any party providing communications services, whether by wire or broadcast or satellite.[23]

In 2000, the FCC promulgated a new set of EEO policies that required that broadcasters and cable operators recruit broadly. The FCC provided two options. Under Option A media companies could choose from a laundry list of recruitment methods, such as "job fairs . . . and interaction with educational and community groups." Under Option B, they would have to keep information on the race or gender of job applicants. The FCC made clear that the annual employment reports would not be used for "screening renewal applications" or "assessing EEO compliance," but "only to monitor industry employment trends."[24]

Fifty state broadcaster associations challenged the new FCC EEO rules, and the court of appeals in the District of Columbia ruled that Option B was unconstitutional in light of *Adarand*, because "the Commission promises to investigate any licensee that reports 'few or no' applications from women or minorities" and thus broadcasters were "sub silentio" pressured to recruit women and minorities.[25]

In June 2001, the FCC's request for the entire panel of the court of appeals to review this ruling was denied.[26] As a result, the Commission has suspended the EEO rules and forms except for the prohibitions against discrimination.[27]

In December 2001, the FCC proposed a new set of EEO rules that are essentially Option A of the rules proposed in 2000. In brief summary these rules would, if adopted and approved by the court, require broadcasters and cable operators to: (1) widely disseminate information concerning a job vacancy; (2) provide notice of full-time job vacancies to recruitment organizations requesting such notice; (3) engage in longer-term recruitment initiatives such as job fairs, scholarship programs, and community information events; and (4) collect listings of full-time jobs identified by title, along with utilized recruitment sources, advertisements, total number of interviewees for each job, the date the job was filled, and documentation of the performance of the required longer-term initiative. This information is required to be placed in the public file annually and will be submitted to the Commission midway through the license term.[28]

The problem, of course, is not the FCC EEO rules. The problem is the application of a law promulgated in *Croson* to federal agencies in *Adarand*, and the specific application of the *Croson* disparity standard to an industry as dynamic as communications. Unfortunately, the FCC has never conducted a *Croson/Adarand* analysis, and that is the first step that needs to be taken by the new administration.

If the FCC does not have the resources to conduct a full *Adarand* study, the next administration should convene a task force comprised of NTIA, SBA, and the FCC to conduct an analysis to determine whether there is any justification to employ race-based measures to advance EEO regulations, as well as efforts to increase minority ownership in the communications industry.

B. Ownership

Some may argue that the focus on employment is wrong, that instead civil rights advocates should be concerned about ownership. In the late 1970s, in recognition of the lack of progress made with stricter employment policies than those in place today, the FCC ruled that minority ownership was essential to create a diverse range of messages over the public's airwaves. Civil rights leaders were at the forefront of the battle for rules to promote minority ownership; among those testifying before Congress in support of such rules in 1974 were Ron Brown, on behalf of the National Urban League, and Joseph Rauh, Jr., on behalf of the Leadership Conference on Civil Rights.[29] Policies promoting minority ownership were established by the FCC,[30] and reaffirmed by the Supreme Court in the *Metro Broadcasting* decision of 1990.[31]

In April 1995, however, Congress (with Republicans finally in control) teamed up with President Clinton (chastened by Democratic defeats in the mid-term election) to kill the most effective method for increasing minority ownership, the tax certificate.[32] With minority-owned broadcast licenses stuck at around three percent,[33] the loss of an incentive to sell to minorities makes any progress beyond that invisible ceiling impossible. And in June 1995, in reaction to the Supreme Court's *Adarand* decision,[34] the FCC rescinded rules designed to help women and minorities participate effectively in the spectrum auctions for PCS licenses.[35] At a Department of Commerce hearing on minority ownership, testimony about the impact of media concentration made possible by relaxed ownership rules and continuing barriers to sufficient financial resources suggests little progress will be made in increasing the number of minority owners of communications companies.[36]

In 1999 and 2000, the Kennard FCC commissioned a series of studies under the authority of section 257 of the Telecommunications Act to identify and eliminate market entry barriers to the communications industry. These studies included:

- *Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?*, prepared by a team of researchers from Santa Clara University;
- *Study of the Broadcast Licensing Process*, prepared by KPMG LLP Economic Consulting Services, consisting of three parts: "History of the Broadcast Licensing Process"; "Utilization Rates, Win Rates, and Disparity Ratios for Broadcast Licenses Awarded by the FCC"; and "Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC";
- *FCC Econometric Analysis of Potential Discrimination: Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions*, prepared by Ernst & Young LLP;
- *Study of Access to Capital Markets and Logistic Regressions for License Awards by Auctions*, prepared by Professor William Bradford at the University of Washington; and
- *Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present*, prepared by the Ivy Planning Group LLC.[37]

These studies were preceded by "When Being No. 1 Is Not Enough," a report on discriminatory advertising practices, issued by Kofi Ofori of the Civil Rights Forum on Communications Policy.[38]

While these reports do not substitute for a comprehensive *Adarand* study, they suggest both substantial barriers to minority participation in media ownership, and they suggest that minority ownership does have an impact on diversity of content, particularly news and public affairs. As was discussed in the Policy Forum on Market Entry Barriers held in December 2000, substantive efforts are needed to correct the lack of minority participation in the media industry, particularly in light of relaxed media ownership rules.[39]

In January 2001, the National Telecommunications and Information Administration (NTIA) released *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States*, a report on minority ownership of broadcast stations. Among other things it found that minorities, taken as a whole, have made some gains since 1998. In 2000, 187 minority broadcasters owned 449 full-power commercial radio and television stations, or 3.8% of the 11,865 such stations licensed in the United States. However, minority owners' share of the commercial television market decreased in 2000. The 23 full-power commercial television stations owned by minorities in 2000 represented 1.9% of the country's 1,288 such licensed stations.[40]

The next administration should continue to review the progress of minority ownership, and in particular review the impact of the relaxed ownership rules in radio on minority ownership opportunities and service to underserved communities. It should also review whether federal small business loans are sufficient to allow underrepresented groups to participate in the market for communications companies.

III. Separate and Unequal Access

The National Telecommunications and Information Administration of the Department of Commerce (NTIA) has helped to make prominent a new term for inequality in the new century — the "digital divide." While the term has been useful in drawing attention to the ever-present fact of inequality in America, it has also come to mean many different things to many people, and conversely it has come to have less and less shared meaning to all. Our focus here is on the unequal access to what is now called the National Information Infras-tructure: the analog and digital network of telephone, microwave, cellular, and common carrier cable operations through which all Americans are able to share information.

Like our small roads and many-lane highways, this network is intimately connected to interstate commerce. While much of this network is privately owned, it is all regulated and protected by various levels of government. And much of the research and development that upgrades it (such as the creation of the Internet) comes courtesy of taxpayer contributions.[41] Thus, our relationship with this "Information Superhighway" is not merely as consumers but as citizens. Consumer issues of affordable rates and fraud are important concerns. Concerns about unequal deployment are distinct and just as important. What follows are brief reports on disparities in access to Internet service, access to advanced telecommunications service, and access to basic telephone service; and a very brief analysis of federal policy addressing those disparities.

A. Access to Internet Service

In October 2000, NTIA issued its fourth report on the digital divide, "Falling Through the Net." NTIA found that despite increased Internet access by all groups, significant gaps remain. The access rates for black households in August 2000 was 23.5%, and for Hispanics the rate was 23.6%. Asian Americans and Pacific Islanders had access rates of 56.8% and white Americans had access rates of 46.1%.

Hispanics and blacks at incomes below $15,000 have access rates of 5.2% and 6.4%, respectively. Asian Americans at comparable income levels have access rates of 33.2%.

The overall rate for access to the Internet for households with incomes below $15,000 is 12.7%.[42]

B. Access to Advanced Telecommunications Service

The above figures note mere access to the Internet, but they do not report on the quality of that access. Anyone who uses the Internet for simple research (to assist with a high school homework assignment, for example) knows there is a major difference between a regular dial-up telephone service and a high-capacity (allowing more data), high-speed service. These advanced communications services, also known as broadband, are increasingly available over modified cable service, satellite, digital wireless, fiber, and other telephone-based technologies (ISDN and DSL).

NTIA reports that 4.4% of all U.S. households had access to the Internet at home via advanced telecommunications services, while 37.7% had access via regular dial-up services. There was little disparity regarding access to advanced telecom-munications services between racial groups (Asian Americans — 11.7%, whites — 10.8%, blacks — 9.8%, and Hispanics — 8.9%) among online households. Households with incomes of $75,000 or greater have access to advanced services at a rate of 13.8%, while households with incomes under $15,000 have rates of 7.7%. Note that the low-income rates are inflated most likely by students reporting income of less than $5,000 but advanced access at a rate of 9.9%.[43]

The FCC also released a report on access to advanced telecommunications services in August 1999 and noted the following:

- Those outside of large population centers, including rural customers, are particularly vulnerable *to not being served by market forces alone* (emphasis added). There is at least one subscriber to high-speed service in 57% of the sample small-town zip codes, but only 13% of the more sparsely populated towns had a subscriber to high-speed service.
- Survey data indicate that low-income consumers are particularly vulnerable to not having affordable access to high-speed services. Of the zip codes with the lowest household income, only 42% include a high-speed subscriber. On the other hand, data show that, of zip codes with the highest household income, 90% include a high-speed subscriber.[44]

C. Access to Basic Telephone Service

As important as the disparity is between those who have access to the Internet, there is a lingering disparity over basic telephone service. In 1999, NTIA reported that having a telephone varies significantly according to income, education level, race, age, household makeup, and whether you live in a rural or urban area.

Only 78.7% of the lowest-income households (i.e., less than $5,000 annually) have telephones. If you are poor and living in a rural area, a household's chances are approximately three out of four of owning a phone. At the opposite end of the spectrum, if a household earns more than $75,000 and is located in central city and urban areas, it is particularly likely (98.9%) to own phones.

Approximately 95.0% of all white households have phones, regardless of where they live. This contrasts sharply with minority households, particularly those such as rural-dwelling American Indians/Eskimos/Aleuts (76.4%), Hispanics (84.6%), and blacks (85.4%).

The disparity based on race/origin is also affected by income level. At the highest income level ($75,000 or higher), there is virtually no difference among household penetration rates. At the lowest income level (less than $15,000) the disparities are pronounced: American Indians/Eskimos/Aleuts (72.3%), blacks (78.1%), and Hispanics (81.9%) have the lowest penetration rates, compared to Asians/Pacific Islanders (90.9%) and whites (89.1%).[45]

Telephone penetration in Indian Country is appallingly low. The Navajo Reservation, covering large areas of Arizona, New Mexico, and Utah, reports that 81.6% of their households are without phone service.[46] Imagine a parent at home late at night faced with the emergency illness of her small child, afraid or too far away to run to a neighbor, and with no telephone in sight, no ability to dial 911. This was the situation faced by one Navajo family.[47] It is a situation that confronts 5.7 million American households in the information age.

In August 2000, the FCC released the 60th anniversary edition of Statistics of Communications Common Carriers (if you have access to high speed Internet service you might have the patience to download it "free of charge"). In 1999, 94.6% of households had access to basic telephone service. Over 11% of the households in Mississippi are without telephone service, the worst telephone penetration rate (88.8%) in the country. The next worst states are President Clinton's Arkansas (90.1%), Oklahoma (90.5%), and the nation's capital, which is in a dead heat with the home state of House Energy and Commerce Chair Billy Tauzin (R-Louisiana) at 90.8%.[48]

Unequal access to the National Information Infrastructure affects nearly every part of our lives today. It amplifies and reinforces inequalities in education, health care, financial services, job opportunities, and political information.[49] Though affordability is an issue for many Americans, there is another issue that is more subtle and invisible: deployment. Both of these concerns can be addressed by federal and state policies.

D. Universal Service

Universal service is, like "the public interest" and "all men are created equal," a flexible concept that mirrors our national shifts (if not certain progress) over time. There is a debate over the origin of the term,[50] and there are efforts to redefine it in this new digital era.[51] We acknowledge this conversation only to suggest that civil rights considerations should inform this discussion.

Risking oversimplification in the interest of clarity, universal service will be described here as it is established in the 1996 Telecommunications Act and the FCC's interpretation of that Act. Section 254 of the Act allows the FCC to establish subsidies for an "evolving level of telecommunications services" at "just, reasonable, and affordable rates." Those subsidies are to be provided by "all telecommunications carriers providing interstate telecommunications services." The Act specifically notes as beneficiaries "low-income consumers and those in rural, insular, and high-cost areas." Elementary and secondary schools, libraries, and rural health care providers are also to be provided subsidies in a program known as the E-Rate. And the goal of the Act can be understood to provide these beneficiaries "reasonably comparable" access to those services and to those rates provided in urban areas.[52]

In response to the Act, the FCC offers universal service support to: (a) telecommunications carriers in rural, insular, and high-cost areas, where telecommunications services are often more expensive to provide; (b) low-income consumers, through the Lifeline program (which provides monthly reductions in service charges) and Link Up program (which provides reductions in initial connection charges); and (c) elementary and secondary schools, libraries, and rural health care providers through the so-called "E-Rate" program. In addition to these subsidies, the Department of Education is providing support to community technology centers that provide advanced telecommunications access to underserved areas.

1. Universal Service Support to Insular Areas

Regarding support to insular areas, the most significant advances have been policies to provide telecommunications services to Indian Country. On June 8, 2000, the FCC substantially reduced the price of basic local phone service for income-eligible customers on tribal lands; streamlined the process for receiving universal service support for companies that seek to serve tribal lands as an eligible telecommunications carrier; and, created additional incentives for wireless carriers to serve tribal lands.[53] These efforts should be continued and reviewed by the next administration.

2. Lifeline and Link Up

The Lifeline and Link Up programs directly benefit eligible low-income consumers. The federal Lifeline program provides between $3.50 and $7 per month to providers to enable them to reduce eligible consumers' monthly charges. The amount of federal support will vary depending on decisions made by the state commission (such as whether to provide state support and how to determine eligibility). But eligible low-income consumers in every state, territory, and possession will receive at least a $3.50 reduction on their telephone bill in the form of a credit against their $3.50 per month subscriber line charge as a result of the federal universal service support program. The reduction applies to a single telephone line at qualifying consumers' principal place of residence.

Link Up offers eligible low-income consumers: (1) a reduction in the local telephone company's charges for starting telephone service (the reduction is one-half of the telephone company's charge or $30.00, whichever is less); and (2) a deferred payment plan for charges assessed for starting service, for which eligible consumers do not have to pay interest. Eligible consumers are relieved of paying interest charges of up to $200 which are deferred for a period not to exceed one year.[54]

Lifeline and Link Up programs have been very effective in subsidizing telephone service for the poor; unfortunately, little effort is made to let the poor know they are eligible for subsidized telephone service. There have been strong efforts demonstrating the effectiveness of outreach in increasing participation in these programs, such as the program managed by the Public Utility Law Project in New York, created in cooperation with the State of New York and Verizon (formerly NYNEX and Bell Atlantic).[55] But there remain significant numbers of people eligible for these subsidies who simply don't know they exist.[56]

The FCC, perhaps in concert with other federal agencies, such as the Departments of Housing and Urban Development, Health and Human Services, Education, Agriculture, and the Interior, should devote more resources to inform those eligible for Lifeline and Link Up support.

3. The E-Rate Program

Despite numerous attacks by conservative opponents as the "Gore Tax,"[57] the FCC's implementation of the so-called E-Rate program can be called a substantial success in reducing inequality of access in minority communities.[58] By 1999, after the first two years, the E-Rate program committed $3.65 billion to over 50,000 schools and libraries. Roughly one million public school classrooms were connected to modern telecommunications networks. Fully 70% of 1999 funding went to schools from the lowest income areas, and portions of those funds will reach 70% of the schools under the Bureau of Indian Affairs. In addition, the program connected nearly 13,000 community libraries.[59] In year three of the program, $4.72 billion has been requested,[60] suggesting a continued role for this subsidy support of schools, libraries, and rural health care centers. This program should be continued.

E. Support for Community Technology Centers

In May 2000, Commerce Secretary William M. Daley announced the award of a $100,450 contract to the Virginia Polytechnic Institute in Blacksburg, Virginia, to survey 100 Community Technology Centers (CTCs). According to Daley, "The role that Community Technology Centers play in helping to bridge the digital divide cannot be overstated."[61]

In September 2000, Education Secretary Richard Riley awarded a one-year $2 million contract to support community technology centers, "especially those in lower-income and hard-to-reach rural areas." The funds are being used to support a group of Community Technology Centers, under the name America Connects Consortium, which in turn will provide technical assistance to other CTCs. CTCs are at the center of efforts to close the information technology divide because, unlike many schools, libraries, or health care facilities, they are able to provide those in economically disadvantaged areas with after-hours ready access to the Internet.[62]

The Department of Education has requested additional funds to establish 1,000 CTCs in low-income and rural neighborhoods across the country. As of this late date, those funds have not been approved by Congress. Then-Governor George Bush promised to "invest $400 million to create and maintain more than 2,000 community technology centers every year." And former Vice President Al Gore set a goal of creating 2,000 Community Technology Centers in low-income neighborhoods by 2002.[63] There seems to be bipartisan support for CTCs aimed at assisting low-income communities' access to the Internet.

F. Information Redlining

Subsidies are of very little help if the subsidized service is not available in your area. One result of living in a still very segregated society is that minorities and the poor are subject to the perceptions held by business decision-makers who don't live near them about the interest in or ability of minority or poor people to purchase "high-end" services. Decisions to deploy cable or fiber networks in wealthy communities based on assumptions that minorities could not or would not afford such services are not necessarily based on information but perception. The logic of the market seems to suggest that rapid deployment in wealthier neighborhoods is the most sensible way for communications companies to recover costs. As Santa Clara University Law School Professor Al Hammond has argued,

> *[Advanced telecommunications] systems will first be built in communities* perceived *to possess the requsite dollars and demand. Many inner city and rural communities, as well as [older] near suburbs, are not viewed as desirable markets regardless of their actual consumption of telecom and video services. (emphasis added)*[64]

The NAACP, La Raza, and other civil rights groups have participated actively in the controversy generated by Ameritech's plan to deploy high-capacity wires in a manner that looked suspiciously like "information redlining."[65] Bell Atlantic originally proposed to wire every home and business with fiber optic cable, but apparently has focused on suburban areas, bypassing poorer urban communities.[66]

Market logic is not supported by market reality. As Pennsylvania State University Professor Jorge Schement points out:

> *African-Americans subscribe to premium cable at nearly twice the rate of white households (45% to 26%), while Latino households fall in between (35%). Twenty-two percent of HBO's subscriber base comes from African-American households, amounting to 42% of all African-American homes. African-Americans order pay-per-view programs at twice the rate of whites, with Latinos again in between.*[67]

NTIA research also indicates that many of the most disadvantaged groups, in terms of computer and modem penetration, are the most likely users of online services featuring education and economic opportunity programs.[68]

Professor Schement argues that American ethnic groups make very different choices about what media services to bring into their homes based on a complex set of factors, including cultural preferences. But it is not difficult to understand why an African American household would choose to purchase a fix-cost premium cable service rather than a telephone with costs that may vary tremendously from month to month.

But how would an executive living in a gated and segregated community understand this, even assuming no bias?[69] Our surveys of decision-makers in media companies have turned up all sorts of silly and ugly stereotypes (such as "Black people don't eat beef," and "Hispanics don't bathe as frequently as non-Hispanics").[70] These vestiges of slavery and Jim Crow mark our culture and warp our supposedly free market.

Segregation not only affects the perception of other by isolated executives, it affects entire communities. A cable company that does not deploy in a neighborhood because it has a large population of Latinos affects not only a Latino family but the schools and the health centers and the businesses in that community. As noted earlier, concerns about electronic redlining have been expressed since the early 1990s.[71] One result of that expression was the creation of section 706 of the Telecommunications Act.[72]

As mentioned above, in August of 2000, the FCC issued a report on the availability of high-speed and advanced telecommunications services in accordance with Section 706. Their national survey showed that there were 2.8 million total subscribers for these advanced services. Resulting in the conclusion that "that advanced telecommunications capability is being deployed in a reasonable and timely fashion overall." Those of us concerned about issues of equity may be disturbed about this conclusion given that the same report also demonstrated that certain groups "are particularly vulnerable to not receiving service in a timely fashion."[73] The mandate of section 706 was to determine deployment of advanced services "to all Americans."

The first challenge is to get a clearer report on deployment. As former FCC Commissioner Gloria Tristani notes:

> *As the Report itself acknowledges, the zip code data are of limited usefulness, because providers were asked to report whether there is at least one subscriber in a particular zip code, not the number*

> *of subscribers in a particular zip code. Thus, the data do not indicate the extent to which the presence of a broadband in a particular zip code indicates more widespread availability. The availability of data on actual numbers of subscribers in a particular zip code or data at a more granular geographic area would provide a better picture of the state of deployment.*
>
> *Similarly, because providers were not required to distinguish between residential and small business customers, the data do not provide an accurate snapshot of deployment to residential users. In some zip codes, broadband and advanced services may be available to business users but unavailable, and perhaps unaffordable, to residential users. In addition, the available data do not track service providers with fewer than 250 lines installed to subscribers in any state. Accordingly, there may be a substantial number of small providers' lines that are unreported, another piece of data that is necessary for a more complete view of deployment.*[74]

Once we are able to determine with better accuracy whether deployment of advanced telecommunications services occurs in a way that avoids poor and minority communities, we can propose methods to deter this redlining. Those methods might include informing decision-makers about the true value of minority markets receptive to advanced services, encouraging state or municipal deployment in underserved markets, or providing private industry with incentives to deploy in those markets.

IV. One More Challenge

Those in and out of the government concerned about civil rights have continuing battles over affirmative action, hate crimes and church burnings, housing and lending discrimination, inadequate education in resegregated schools, racial profiling, underfunded enforcement of EEO laws, and a host of other concerns. How can this small band possibly take on one more challenge? Why should they put something as seemingly abstract as communications policy on a plate already overburdened?

Imagine the world of Jackson, Mississippi before Reverend Parker ventured there. The televised pictures of attack dogs and fire hose sprays and police beatings that took place in Birmingham and Selma, and so affected Northern viewers, went unseen in nearby Jackson. In Jackson, the images of black Americans were not those noble marchers but happy mammies and smiling coon caricatures with watermelon in hand. In Jackson, the sharecropper's son or daughter would not have seen the March on Washington, or heard Martin Luther King's dream of their future. Imagine having no recourse to this set of circumstances. Reverend Parker understood the damage done to the spirit of a people when they have no control over their own image, when their voice cannot be heard, when their conscience cannot be stirred to rebel or to hope or to vote. That is why ensuring civil rights considerations applied to local broadcasters was so important. If it was important to fight for equal education and an equal opportunity to benefit from the public road, it is important to fight for equal access to avenues of speech and information and equal opportunities to benefit from the information superhighway.

Perhaps it is difficult to imagine the world of Jackson, Mississippi, before Reverend Parker. Try this: Imagine a world where the predominant image of minority youth is televised mug shots of gangsters, either wanted or in handcuffs. Imagine a world where parents do not have access to a telephone to call to help their child. Imagine a world where the poor do not have access to educational resources, or health care resources, or employment resources, because they cannot afford a telephone line, much less a computer. Imagine that they can afford advanced services but those services are deployed in a way that avoids their neighborhoods. This should not be hard to imagine because this is our nation.

This is the heart of the battle, and it is faced not only by black Americans but by Latinos and Asian Americans and poor whites. Communications policy is fundamental and crosscutting. Information infrastructure is as vital to health care and education and business as sewer systems and electricity. The communications policy debate is not a debate about gadgets or even markets. It is a debate about who gets to speak and to hear, and for what price, and to whom. It is a debate about the nature of our democracy.

Many, including this author, consider the 1996 Telecommunications Act a deeply flawed and compromised set of laws. But within it are important opportunities to preserve and extend concepts of equal access and public interest responsibilities. To the degree that the next administration can ensure that all Americans benefit from new advances in communications technologies, civil rights considerations of equal opportunity and democratic participation must be an important part of their rulemaking.

It is not a matter of establishing new rights. The Communications Act obligates broadcasters, and cable operators, and telephone companies to operate in the public interest, convenience, and necessity. This obligation creates a set of rights bestowed upon broadcast viewers and listeners, and cable and telephone customers. Congress and the Supreme Court have made it clear time and again that balanced against the right of corporations it is the average American who enjoys the paramount right to speak, and the right to reasonable rates, and access to service, and to privacy. The challenge is not to establish a new set of rights, but to understand and articulate and give teeth to the set of rights we have. The problem is as old as the nation itself: those rights we do not protect with vigilance will slip away.

Endnotes

[1] Mark Lloyd is the Executive Director of the Civil Rights Forum on Communications Policy, a project of the Tides Center. The Forum works to bring civil rights and community groups into the debate over our media environment by monitoring and reporting on state and federal legislative and regulatory action, and by conducting meetings and building coalitions. Previously, he worked as a communications attorney in Washington, D.C., representing both commercial and noncommercial communication companies for the firm of Dow, Lohnes & Albertson. He also has nearly 20 years of experience as a broadcast journalist, working as a reporter and producer at public and commercial radio and television stations, and at NBC and CNN. He is the recipient of several awards for his writing and reporting, including an Emmy and a Cine Golden Eagle. Mr. Lloyd is Chairman of the Board of Directors of the Independent Television Service (ITVS), an organization supported by the Corporation for Public Broadcasting to fund independent television producers. He also serves on several other national boards and advisory panels, including the Ad Council's Advisory Committee on Public Issues, the George Washington University National Task Force for Democracy Online, and the Leadership Conference on Civil Rights Education Fund. He received his Bachelor's degree from the University of Michigan and his law degree from the Georgetown University Law Center.

[2] K. Mills, Civil Rights Forum on Communications Policy, *Changing Channels, The Civil Rights Case that Changed Television* (1998).

[3] *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 Federal Reporter 2d 994 (1966).

[4] *Documents of American Broadcasting*, at 233 (F. Kahn ed., Prentice-Hall 1984).

[5] *Report of the National Advisory Commission on Civil Disorder, Otto Kerner, Chairman*, at 210 (Bantam 1968) (Kerner Commission Report).

[6] 42 U.S.C. § 307.

[7] *Window Dressing on the Set: An Update.* The last year the U.S. Commission on Civil Rights issued a report on minorities in the media was 1979. One staff person said anyone looking at TV can see the report had its desired effect so there was no need to continue the short-lived series. The fact that President Reagan came into office a year later and began an immediate attack on the Commission and its budget may also have had something to do with the Commission's lack of work in this area.

[8] 47 U.S.C. § 161, as amended (1997).

[9] 47 C.F.R. § 73.2080 (b) (1994).

[10] *Newhouse Broadcasting Corp.*, 37 Rad. Reg. 2d 141, decided Apr. 21, 1976.

[11] *In the Matter of Review of the Commission's Broadcast and Cable Equal Employment*

Opportunity Rules and Policies, Report and Order, MM Docket No. 98-204, released Feb. 2, 2000.

[12] *Lutheran Church–Missouri Synod v. Federal Communications Commission*, 141 Federal Reporter 3d 344 (1998) ("*Lutheran Church*").

[13] *Lutheran Church* at 355-57.

[14] *<http://www.childrennow.org/newsroom/pr-7-18-00.htm>, <http://www.cmpa.com/factoid/diverse.htm>, <http://www.cmpa.com/archive/hisp2.htm>.*

[15] *<http://rtnda.org/research/womin.shtml>.*

[16] *<http://www.civilrightsforum.org/connect990715.htm#whitewash>.*

[17] *<http://www.civilrightsforum.org/connection000115.html#networks>.*

[18] *Report and Order* at 87-89.

[19] *<http://www.civilrightsforum.org/connection000201.html#FCC>.*

[20] *<http://www.fcc.gov/csb/facts/cblbdcst.html>.*

[21] *<http://www.roper.com/news/content/news10.htm>.*

[22] *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S.C. § 547, 583 n. 34 (1990).

[23] S. Jennell Trigg, *The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of* Adarand Constructors, Inc. v. Pena, 4 CommLaw Conspectus 237 (Catholic University Law School Summer 1996).

[24] *Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies*, 15 F.C.C.R. 2329, 120 (2000) (R&O).

[25] *MD/DC/DE Broadcasters Association v. Federal Communications Commission*, 236 Federal Reporter 3d 13 (2000).

[26] *<http://www.ll.georgetown.edu/Fed-Ct/Circuit/dc/opinions/00-1094b.html>.*

[27] *Equal Employment Opportunity Outreach Program Requirements*, 16 FCC Record 2872 (2001).

[28] *<http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-363A1.pdf>.*

[29] *Broadcast License Renewal Act: Hearings on S. 16* et al. *Before the Subcommittee on Communications of the Senate Committee on Commerce*, 93rd Congress 2d Session Part 1, at 325-329, 408-411.

[30] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979 (1978).

[31] *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S.C. § 547 (1990).

[32] K. Ofori and M. Lloyd, "The Value of the Tax Certificate," 61 *Federal Communications Law Journal* 693 (1999).

[33] *<http://www.ntia.doc.gov/reports/97minority/overview.htm>.*

[34] *Adarand Constructors, Inc. v. Pena*, 115 Supreme Court Reporter 2097 (1995).

[35] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order*, P.P. Docket 93-253, FCC 95-301, released July 18, 1995.

[36] *<http://www.civilrightsforum.org/connectionaugust 2000.html#broad3>.*

[37] *See, generally, <http://www.fcc.gov/opportunity/meb_study/>.*

[38] *<http://www.civilrightsforum.org/fccadvertising.htm>.*

[39] *<http://www.fcc.gov/realaudio/mt121200.ram>.*

[40] *<http://www.ntia.doc.gov/opadhome/mtdpweb/01minrept/mtdpcontents00.html>.*

[41] There is a persistent myth that the Internet is unregulated. The Internet operates over a very regulated common carrier, cable, and satellite infrastructure. *See <http://www.isoc.org/internet-history/>.*

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[42] *<http://www.ntia.gov/ntiahome/fttn00/falling.htm>*, checked at 11/20/00.

[43] *<http://www.ntia.doc.gov/ntiahome/fttn00/falling.htm>.*

[44] *<http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/nrcc0040.html>.*

[45] *<http://www.ntia.doc.gov/ntiahome/fttn99/part1.html#b>.*

[46] Marcia Warren *et al.*, *Native Networking: Telecommunications and Information Technology in Indian Country* (Benton Foundation 1999).

[47] *<http://www.civilrightsforum.org/connect990531.htm#native>.*

[48] *<http://www.civilrightsforum.org/connectionsept2000.html#comm>.*

[49] A. Hammond, "Standing at the Edge of the Digital Divide," *in The State of Black America* (Daniels *et al.* eds., National Urban League 1999).

[50] *<http://www.vii.org/univsvce/cacm.htm>.*

[51] *<http://www.benton.org/Library/Universal/Working1/working1.html>.*

[52] 47 U.S.C. § 254.

[53] *<http://www.fcc.gov/indians/>.*

[54] *<http://www.fcc.gov/ccb/universal_service/fcc97157/>.*

[55] *<http://www.pulpny.org/html/telephone_lifeline.html>.*

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[73] *<http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/nrcc0040.html>, <http://www.civilrightsforum.org/connectionsept2000.html#comm>.*

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Chapter 21

The Adverse Consequences of a New Federal Direction

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Introduction

There is a fundamental shift in the way Washington works that directly affects the civil rights community. It was best articulated by House Majority Leader Dick Armey and is being implemented with precision by the Bush Administration. In a post-tax cut July 5, 2001, message (*<http://www.freedom.gov/library/retirement/relimit.asp>*), Armey said, "Did we Republicans come to Washington merely to slow the growth of leviathan government? Or did we come to shrink and re-limit it? *I say we came here to shrink and re-limit it* ... Restraining government [through the tax cut] was step one. Step two is roll-back" (emphasis in original).

It hardly seems necessary to remind any sector of the public of the value of the government or of the need for federal presence. Yet it was not long ago that one of us was downhill skiing on national forest land out west. Going up the chair lift, the other person started to make conversation.

"So where are you from?"

"Washington, D.C."

"Oh, I'm sorry to hear that. Government hasn't done anything worthwhile or right. We should just get rid of it."

Picking up the battle, the dialogue began. "What about Social Security?"

"Oh, that doesn't count."

"What about laws to prevent discrimination?"

"Oh, that doesn't count."

"What about the Interstate highway you took to get here?"

"I didn't realize that was the federal government."

Then the final blow, "Did you know we are skiing in a national forest?"

"I hadn't thought about that as federal government." The skier could not wait to get out of that chair.

Yet President Bush has ridden the naivete of Americans like this skier to pursue a radical agenda that makes the Reagan Administration appear as though it were liberal. This can be seen on three fronts:

- The disinvestment of the federal government that results from pursuing a tax cut agenda that primarily benefits the wealthy in this country and cutting back on the scope of government;
- The dismantling of regulatory protections that have taken years to develop as evidenced by the roll back of Clinton Administration regulations and the promotion of the faith-based initiative; and
- The devolution of federal responsibilities including enforcement of laws and regulations.

These three Ds — disinvestment, dismantling, and devolution — spell trouble for the civil rights community.

I. Disinvestment

Civil rights issues, including regulation, enforcement, and programs designed to promote political, economic, and social equality and equal access, are intrinsically linked to the federal budget. The budget — who gets what resources — is where the pedal hits the metal in determining whether policies actually get implemented to make civil rights a reality. It is the true measure of our commitment as a nation to social justice. The federal budget is multifaceted, complex, highly politicized, and often difficult to influence. Given its importance to the goal of achieving political, social, and economic equality, some understanding of the politics surrounding the budget is vital. And the story that is currently unfolding is that of a steady disinvestment of federal resources.

Three numbers may best illustrate the historical decline of government spending. In the last year of the Reagan Administration, government spending was roughly 21.2% of the Gross Domestic Product (GDP). In Clinton's last year, spending had dropped to 18.2% of the GDP. By 2006, President Bush proposes to shrink federal spending to 16.6% of the GDP — the lowest percentage of government spending since 1956. These are just the broad strokes showing that government expenditures as a whole are shrinking.[2] In the last year of the Reagan Administration, domestic discre-tionary spending was 3.5% of the GDP. At the end of Clinton's term it was 3.3% and under President Bush's budget it would shrink to 3.1% in 2006, lower than at any time from 1962, when these data became available.[3]

Federal fiscal policy is a reflection of our priorities as a nation as well as a statement about the role of government in our civil society. Conservatives have long recognized this and have launched long-term initiatives to "shrink and re-limit" the role of government through a variety of means, including tax cuts that limit federal and state resources, the erosion of federal regulatory powers, and continued assaults on the efficacy and role of government. Social justice advocates, on the other hand, have largely focused their attention on specific issues without framing their efforts within a broader ideological agenda like overall fiscal policy or the positive role of government. For instance, conservative attacks on the growth of government — measured in dollars — frequently obscure the fact that domestic discretionary spending is actually shrinking as a percentage of the GDP. The fellow on the ski lift referenced in the introduction may be less naive than brainwashed from constant reminders of government waste and inefficiency — which the media is much more apt to report, rather than reporting on the good things that government does.

Conservatives have been very effective in framing their message and in linking up specific issues within a broad long-term ideological position. Thus, the conservative attack on government represents a very effective way to delimit social justice, since a strong federal government is essential to the policies and enforcement and support necessary to achieve that ideal. It is vital that supporters of social justice begin to rehabilitate the idea of government as necessary and important, as well as find ways that government can be more effective — for instance, by forming new partnerships and initiatives.

The voices of ordinary citizens about what they want and expect from government are largely silent — reflected only as polling results, or, as during the last Presidential campaigns, individual examples of the need for a particular policy. From our perspective, the budget reflects a public means of achieving American ideals and values and it presents an opportunity for strengthening community participation in shaping the role our government plays in civil society. In other words, the federal budget is the means to actually accomplish our national goals and values. This requires a vigorous public and political debate about what our domestic priorities are, a discussion that has long been deferred — to policies of deficit reduction and tax cuts and paying down the debt. The terrible events of September 11 seem to have prompted a long absent debate about our national priorities and the role of the federal government in achieving those goals. The September tragedy starkly revealed the costs of disinvestment, for instance, in public health needs; the limits of the private sector, especially in ensuring the safety of airline passengers; the value of public services we've long taken for granted — firefighters and police officers and emergency medical technicians and "ordinary" Americans rising to big challenges; and, with the economic downturn, we are also seeing the holes in the safety net that were less obvious when the economy was booming. The huge budget surpluses that had been predicted have been sharply reduced due to the passage of a huge tax cut, the economic downturn, and the costs of rebuilding and waging war. Budget deficits are certain for the next few years, although a surplus over the next decade is still predicted. Tax cuts, proposed increases in military spending, and the rapidly rising cost of entitlement programs all threaten domestic spending with future reductions during the next few decades. Whether or not there are surpluses, "fiscal responsibility" encompasses far more than balancing the budget or reducing the debt. It includes the responsibility to effectively use federal resources to meet our domestic priorities.

Public opinion research indicates that the vast majority of the American people identify the importance of using federal resources to address a variety of domestic priorities and to accomplish important goals such as civil rights and equal opportunity. Public investment that reflects and implements our values continues to have a broad popular appeal, in spite of its virtual disappearance from the public policy debate, and in spite of the bad rap given government by conservatives. Americans recognize that our shared national ideals like assuring each person the opportunity to succeed — to earn a decent wage and be able to support a family, own a home, raise their children in a healthy and stimulating environment — can only be realized through public policy that provides supports to families and communities. Environmental protection and dealing with big issues like global warming and cleaning up the air and water require the expertise and investment of federal resources. Addressing institutionalized racism and its impacts on the lives of Americans requires federal efforts. Policies to ensure that differently-abled children and adults have the opportunity to fulfill their potential, through special education and training and accessible housing, all require federal resources. Education and job training, scientific and medical research and development, transportation, public safety, health care, community economic development and revitalization — all require good policy and the infusion of federal resources.

Furthermore, it is widely recognized that the United States will face new challenges during the next couple of decades. A rapidly aging population will place new demands on health care and housing. Ensuring a decent quality of life for senior citizens, including increased needs for the service work involved with caring for other people, will become more pressing. We are increasingly ethnically and racially diverse with more and more people living outside a traditional nuclear family structure, whether those are same-sex partnerships, multigenerational households, singles, or grandparents raising grandchildren. While we retain long-standing American values about the value of hard work, individual responsibility, and raising children to be healthy and productive adults, our individual, family, work, and community lives are changing. Effective government programs need to be designed to fit with these shifting demographics and reflect these changes in our social and work lives.

Even many Americans who are reasonably well-off complain about their quality of life — from being stuck in traffic to a shortage of affordable and quality child and elder care to job stress and insecurity and the difficulty of balancing the demands of work and home life. People want affordable housing, safe and liveable communities, environmental protection and clean air and water, safe food, quality education, health insurance — and the opportunities that allow all Americans to have an equal chance at achieving a good life. The way to ensure these benefits is through federal policies and investment. In spite of concerns about government's effectiveness, many people understand the role that the federal government must play in addressing the major challenges that lie ahead.

If investment in America's people became a national priority, innovative new ways of addressing social, economic, political, and environmental problems could be developed and implemented. We could figure out ways to effectively address intractable problems like drug addiction, urban poverty and suburban sprawl, the increase in violence among young people, global warming and environmental degradation, and the continuing entrenchment of racism and homophobia and fear of difference that limit us all. We could provide childcare, pre- and after-school and summer programs for children, and health care for all children who need it. We could make computer technology and the literacy needed to effectively use it available to all Americans. We could address the economic and social roots that often lead to or contribute to drug addiction and crime. The list could go on and on.

Yet federal policy today is not concerned with implementing big ideas. Policy is increasingly small and disjointed, with no effort being made to link up small steps with farsighted goals. The result is a lack of vision, lack of message, growing apathy about the role of government, and enormous opportunity to fulfill the conservative agenda of dismissing government. Young people express dissatisfaction with politics as usual and the absence of an affirmative vision for the country behind which they can rally. Theories of "the missing middle" point out that the national policy debate has been increasingly focused away from middle-income working Americans and argue that no great national purpose can be accomplished without their inclusion.[4] Economists write books about the negative effects of long work and commuting hours and job stress and insecurity on family and community life. While "visioning" efforts to develop and implement shared community goals are taking place in communities across the country, there is no similar affirmative process taking place at the national level.

As Robert Kuttner recently wrote in "Opposition as Opportunity," in *The American Prospect*, proponents of the "view that an efficient economy and a just society require active government and politics as well as a vigorous market . . . have been on the defensive for the past quarter-century . . . recent events, however, create new openings."[5] For the civil rights community, this atmosphere creates a challenge. On the one hand, there remains the need to defend against attacks on federal programs and initiatives that increase income inequality or further damage the social safety net. Yet if undertaken alone, this defensive action robs the community of the opportunities presented by budget surpluses for making positive demands on government. It is time for civil rights advocates to pick up the mantle of what Robert Reich calls "big think,"[6] the advocacy of new ideas to strengthen the quality of life for all Americans.

The challenge of balancing defensive and offensive action is made more difficult by President Bush's initiatives. While the entire $1.6 trillion Bush tax cut may be viewed as an ill-conceived drain on federal resources that could be better spent, the elimination of the estate tax, which exemplifies problems with the larger tax cut, should have raised the ire of the entire civil rights community.

A. The Estate Tax

The civil rights community had enormous stakes in the debate over repeal of the estate tax, since repeal of this long-standing tax would:

- Increase concentrations of wealth and power;
- Sharply curtail charitable giving by removing a major incentive; and
- Reduce federal and state revenues, potentially limiting funds for programs serving low-income and vulnerable individuals and families.

As passed, the Bush tax cut slowly modifies and phases out the estate tax by 2010, but because the entire tax "sunsets" in 2011, the estate tax will then return as it existed before the Bush tax cut was passed. That the estate tax is only repealed for a year ensures that this tax will again be debated during the next decade.

The estate tax was very strategically framed by conservatives as a "death tax," leading to visions of the Internal Revenue Service descending on a grieving family to confiscate over half of the assets of the deceased. In fact, the estate tax is a tax on the assets that are transferred to heirs of the wealthiest Americans, and there are a number of reasons why it is both a valuable and a fair tax.[7] Also lost on the public is the fact that the tax affects less than 2% of taxpayers, who happen to be the wealthiest among us.

1. Concentrations of Wealth and Power

Without the estate tax, accumulated wealth could be passed from generation to generation, leading to huge concentrations of wealth in the hands of a few and creating a new aristocracy. The United States was founded on the ideal of a meritocracy and a rejection of the strictures imposed by European aristocracy. Throughout history many political theorists and philosophers have been concerned about the negative effects on democracy and social well-being when great inequality of private wealth and resources exists in a society. President Franklin D. Roosevelt supported an estate tax to avoid the "perpetuation of great and undesirable concentrations of control in a relatively few individuals over the employment and welfare of many, many others."[8]

An inheritance is unearned income. It is a windfall from having the right parents — hardly a well-earned reward for individual initiative, hard work, and the entrepreneurial spirit. In fact, inheritances can have a negative effect on initiative and hard work. Andrew Carnegie, the great philanthropist, felt that the "parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and leads him to lead a less useful and less worthy life than he otherwise would."[9] In a curious juxtaposition, the repeal of the estate tax entitles the children of wealthy parents to benefit from that wealth, without taxation, while a single mother with small children is no longer entitled to public support but is required to work, pay FICA taxes on each dollar she earns, and even pay income taxes on her earnings if she's fortunate enough to earn a living wage. Further, the loss of federal and state resources as a result of repeal of the estate tax means that services the single mother needs to keep on working, like health care and child care and access to transportation, will be threatened with cuts. This reflects the focus of the entire tax cut – it is a double hit on low- and middle-income families. The tax cut primarily benefits those wealthy Americans who need it least, while at the same time reducing federal and state revenue to fund programs for those low- and middle-income families who will receive only minimal, if any, benefits from the tax cut.

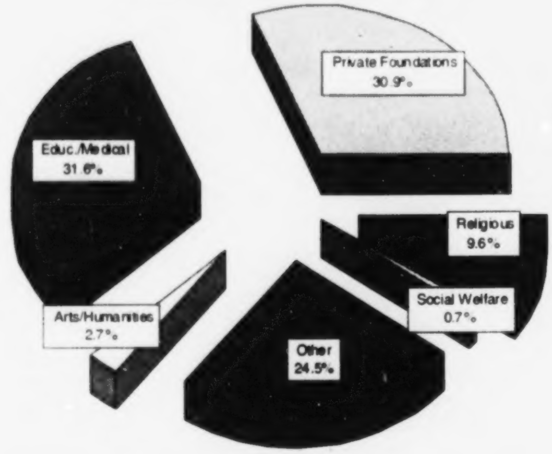
The debate about the estate tax was greatly enriched by the efforts of the Responsible Wealth project of United for a Fair Economy — a group of wealthy individuals, many of whom, like Bill Gates, Sr., anticipate an estate tax liability. These wealthy individuals expressed their moral obligation to give back to society and to repay the benefits they received from government, which contributed to their success. Before the Responsible Wealth involvement, repeal of the estate tax enjoyed strong support and was practically a given; and it is fair to say that the Responsible Wealth effort was paramount in turning the debate around in

Charitable Deductions Claimed in Estate Tax Returns: 1999

Size of Gross Estate	No. of Returns	No. with Charitable Deductions	% Claiming Charitable Deductions	Total Charitable Deductions	Average Charitable Deduction Per Return
$600,000 to $1 million	49,898	6,640	13.31	$1,141,747,000	$171,950
$1 million to $2.5 million	40,779	7,354	18.03	2,380,900,000	323,756
$2.5 million to $5 million	8,626	2,000	23.19	1,492,748,000	746,374
$5 million to $10 million	3,050	896	29.38	1,414,928,000	1,579,161
$10 million to $20 million	1,083	409	37.77	1,392,114,000	3,403,702
$20 million or more	577	261	45.23	6,752,878,000	25,873,096
Total	*103,993*	*17,559*	*16.18%*	*$14,575,316,000*	*$830,077*

Source: IRS, *Statistics of Income*, unpublished data, March 26, 2001.

Bequests by Recipient: 1995



Source: IRS, *Statistics of Income Bulletin*, Summer 1999, Publication 1136 (9-99)

favor of retaining the tax. Repeal of the estate tax, which seemed to be a foregone conclusion after more than ten years of effort by supporters of repeal, was suddenly not so certain after all.

In response, however, Robert Johnson, the billionaire founder of Black Entertainment Television, who is also a member of Bush's committee of Social Security privatization "reformers," gathered together a group of black business leaders and organized a newspaper ad campaign demanding repeal of the estate tax. Mr. Johnson argued that unlike "very wealthy white Americans" who support the estate tax, "[w]e as African Americans have come to our wealth on a different path, a different road than they have," and that elimination of the estate tax "will help close the wealth gap in this nation between African American families and White families." Whether or not the elimination of the estate tax would shrink the income gap between the very richest white families and the much smaller percentage of very rich black families, it would come at the expense of low-income families, who are disproportionately black, thus ultimately making the wealth gap even wider.

A number of commentators pointed out that Johnson's arguments were weak and self-serving; much of the accumulation of his current wealth was accomplished through "tax free transactions," and, absent an estate tax, much of his wealth would never be taxed, making quite a windfall for his heirs.[10] Johnson's arguments had nothing to do with civil rights and everything to do with preserving the privilege of the wealthy, whatever race.

The estate tax is a source of substantial federal and state revenue, as well as being an incentive for charitable giving. The following sections will discuss those two benefits more fully. In terms of the redistributive aspect of the estate tax, it is important to note that when federal revenue is limited, time and again we see programs for low-income and vulnerable individuals and families being the first to receive cuts. Many charitable organizations, including service providers like soup kitchens and homeless shelters, only exist because of charitable contributions from wealthy individuals and foundations. The estate tax is a means to keep wealth and income inequality from increasing even more rapidly than it is, both by preventing huge concentrations of inherited wealth and by providing federal resources and an incentive for charitable giving so that we can extend a hand up to those in need. While the estate tax may not be the most effective method for redistributing wealth and preventing the widening gap between the very rich and the rest of us, especially because of the many loopholes that allow the wealthy to avoid payment of the tax, it does achieve some benefit as our most progressive tax.

Charitable Bequests by Type of Recipient: 1995

Type of Recipient	No. of Bequests	Total Funds Bequested	Average Bequest Per Return
Private Foundations	981	$3,127,984,000	$3,188,567
Educational, Medical or Scientific	7,309	3,194,230,000	437,027
Other	6,355	2,483,781,000	390,839
Arts and Humanities	932	272,800,000	292,704
Religious	8,401	970,445,000	115,515
Social Welfare	611	68,687,000	112,417

Source: IRS, *Statistics of Income Bulletin*, (Summer, 1999) Publication 1138 (9-99).

2 Charitable Giving

Since there is no limit on the amount of money that an estate can contribute to charities — and bequests to private foundations are treated the same as those to public charities — charitable giving is a powerful method of lowering estate tax liability.

It is very clear from tax studies that tax incentives help to stimulate certain behavior, including charitable giving. The estate tax, like other taxes, proves to be an incentive to give to charity. Estates that have tax liability give between two and three times as much to charity as estates without tax liability. For example, in 1997 taxable estates gave to charities 2.1 times the amount nontaxable estates did. (Those filing taxable returns gave $9.6 billion; those filing nontaxable returns gave $4.6 billion.)

As the table demonstrates, the wealthier the estate the greater the number of tax returns claiming a charitable deduction and the larger the charitable bequest. Roughly two-thirds of the $14.6 billion in bequests in 1999 came from estates worth $5 million or more, and nearly half (46.6%) came from the super-rich estates that are worth $20 million or more. While 13% of the returns from estates worth between $600,000 and $1 million made claims for charitable deductions, 45% of the estates worth $20 million or more did so. The last column in the table above shows that as the size of the estate grows, so does the average charitable bequest. The smaller estates give $171,950 on average, whereas the wealthiest estates give an average of $25.9 million – more than 150 times the size of the average bequest from the smallest estates.

So what happens to charitable giving when the estate tax is repealed? Based on econometric data, most agree that repeal of the estate tax will have an adverse impact on charitable giving. The Treasury Department estimates that between $5 billion and $6 billion in charitable gifts will be lost each year when the estate tax is repealed. One respected estate tax attorney says over $10 billion per year in charitable giving will be lost. The estimates of impact vary, but most conclude the impact will be substantial.

In a number of ways civil rights work is supported through the power of the estate tax; work that is being done through a variety of nonprofit advocacy and research groups, educational institutions, religious congregations, and service providers would be affected by repeal of the estate tax. It is difficult to be precise because there is a paucity of data. The Treasury Department, however, published 1995 data on charitable bequests in its 1999 Statistics of Income Bulletin (see figure and table above). The largest number of charitable bequests went to religious institutions (8,401), but the largest dollar amounts went to educational, medical, or scientific institutions and private foundations.

Beyond the impact on religious institutions, civil rights organizations will be significantly affected by a reduction in bequests. Based on the Treasury Department data, it appears that "social welfare" charities — those tax-exempt 501(c)(3) organizations promoting civil rights, community development, social science research, or government effectiveness — would be the least affected by repeal of the estate tax. However, these groups are often heavily dependent on private foundations for support. Given the repeal of the estate tax would adversely affect private foundations, 501(c)(3) groups would also be significantly affected by repeal of the tax. It is estimated that roughly one-third of foundation assets derive from the estate tax.

3. Federal and State Revenues

In addition to the adverse repercussions that full repeal of the estate tax will have on charitable bequests, the tax provides substantial and growing federal revenue that directly aids funding of civil rights initiatives. Since 1996, estate and gift tax revenues have grown at nearly double the rate of the annual increase of other tax revenue (excepting Social Security and other taxes that are off-budget for accounting purposes) — an annual rate of 14.1% for the estate and gift tax and a 7.25% pace for other tax revenue. This rapid growth in the estate and gift tax is likely to continue as the transfer of intergenerational wealth continues to grow.

In FY1999, the gift and estate tax provided $27.8 billion in revenue to the federal government, which was expected to steadily increase to $55 billion over the next nine years, according to the Joint Committee on Taxation. The average annual revenue was projected to be $33.7 billion, which is roughly 4.6% of total discretionary spending.[11]

While this may not seem like a huge amount, given total revenue and outlays of the federal government, the following chart shows what programs and services could be supported by the projected annual revenue of $33.7.

As we are seeing, because of lower surplus estimates due to the economic downturn, depletion of $1.6 trillion plus of the surplus for tax cuts, and bipartisan agreement to use the Social Security surplus for debt reduction, there is less revenue for spending, causing Congress to be faced with difficult funding choices. Traditionally, cuts in discretionary spending are seldom made in military spending. Given the Bush Administration's commitment to increases for defense spending, any cuts in spending will likely be made in domestic discretionary programs. It is not uncommon for such cuts to be made in programs with constituents who have less political clout. Usually this means human services, primarily targeted to low-income families. Thus, in very direct ways, the estate tax repeal can result in significant cuts in human needs programs. The repeal of the estate tax will mean that the super-rich get a tax break while the less fortunate get nothing — and possibly could suffer.

Potential Uses of Annual Average $34 Billion Estate Tax Revenue

Program	Billions
Education of Disadvantaged Children	$8.60
Job Training	1.00
Youth Training/Summer Jobs	1.10
Head Start	6.20
Child Care Block Grant	2.00
Runaway, Homeless Youth	0.07
College Work Study	1.00
Low-Income Energy Assistance (LIEHP)	1.40
Individuals with Disabilities Act	7.40
Community Health Centers	1.20
Substance Abuse Block Grant	1.70
Mental Health Block Grant	0.40
Community Services Block Grant	0.60
Refugee Assistance	0.40
Total	*$33.07*

Source: OMB Watch estimate, Feb. 8, 2001.

Besides the loss of federal revenue, most states have state estate or inheritance tax laws that are "piggybacked," either completely or in part, on the federal estate tax law. An estate's federal income tax liability is reduced by the amount of a state estate tax credit, thus providing revenue to the state without increasing the federal estate tax payment. The new tax law phases out the state tax credit by 2005. This will have considerable negative impact on state revenues as those that rely solely on a pick-up tax will have no estate tax after 2005, unless they pass separate legislation.

Estimates are that states will lose between $65 billion and $100 billion in revenues due to the new tax law. This is coming at a time when many states are having difficulty balancing their budgets and are struggling with effects of the declining economy and escalating energy costs. The failure of the states to fight repeal of the estate tax, in spite of the fact that they stood to lose considerable revenue, is a good lesson for us all.

Since nearly one-third of charity revenue comes from government support, the repeal of the estate tax would have a triple-whammy on charities and possibly civil rights programs. It would mean less money through charitable contributions, reduced grants from private foundations, and less money in government support.

II. Dismantling

This section is divided into two parts. The first part reviews today's attack on health, safety, and environmental protections. Where appropriate we draw implications for civil rights issues. The second part reviews the President's faith-based initiative as an example of how regulatory "reform" and legislation may come together to dismantle the federal grant-making system and the infrastructure for human service delivery.

A. Bush's Regulatory Agenda

The Bush Administration is currently leading a campaign to dismantle regulatory protections for public health, safety, and the environment. There may be a temptation for civil rights activists to ignore these attacks since they do not appear to directly affect civil rights. But we caution against this. Today's rollbacks create an ideological framework, coupled with operational mechanisms, that could affect civil rights issues in the near future.

Moreover, leaving appearances aside, there are direct connections between these attacks and the pursuit of civil rights and social justice. Consider, for example, that industrial pollution is extremely high in poor minority communities; or that children, the elderly, and the disabled are at heightened risk when it comes to environmental contaminants; or that women disproportionately suffer ergonomic injuries — caused by repetitive motion — on the job. These are all civil rights issues.

The administration's initial focus – on health, safety, and the environment – makes political sense. To a large extent President Bush was elected with the backing of industry and conservatives — financially and otherwise — that have long identified regulatory "reform" as a high priority. Industry sees economic gain by reducing or eliminating federal rules.[12] Conservatives see "reform" as a means for rolling back the role of government, as Representative Armey noted in the quote at the beginning of this paper.

In pursuing this agenda, the Bush Administration has taken a number of steps. Specifically, these includes:

1. Abandoning Unfinished Work from the Clinton Administration

In one of the very first actions of the new administration, President Bush's chief of staff, Andrew Card, issued a memorandum temporarily halting agency regulatory activity — effectively blocking last-minute actions by the outgoing administration.[13] The memo instructed agencies to withdraw rules that were waiting to be printed in the Federal Register even though the rules had already been cleared by the Clinton Administration. It also instructed agencies to extend by 60 days the implementation of rules that had been published but had not yet taken effect. Finally, it instructed agencies not to publish any new rules, except in emergency situations, until political appointees were in place to approve them.

The new administration must now decide how to handle these pending regulations and proposed rules that still need to be finalized. For instance, at the end of the Clinton Administration, the Environmental Protection Agency (EPA) proposed new requirements to upgrade many older power plants and industrial facilities with new pollution control equipment. It will be up to the Bush Administration to carry this work forward and issue final standards. Will it happen? There have been no assurances that it will.

2. Rolling Back of Existing Standards

Ever since the Card memo, the administration has been feverishly rolling back health, safety, and environmental protections. This has included tougher standards on arsenic in drinking water, ergonomic protections to protect against workplace injury, the Kyoto Protocol on global warming, restrictions on hard rock mining, and new energy efficiency standards, just to name a few. Given the heavy emphasis on devolution (see discussion in Part III of this paper), also expect retrenchment on various civil rights protections, such as those dealing with the Americans with Disabilities Act and the Family and Medical Leave Act.

3. The Fox-in-the-Hen-House Approach

The Bush Administration is littered with former business lobbyists who are now in the position of regulating the very interests they used to represent. This includes, for instance, the new head of the White House Office on Environmental Quality, James Connaughton, who lobbied Congress on behalf of the Chemical Manufacturers Association, among others, on Superfund issues. The same is true with people hired within the Department of Health and Human Services (HHS) and the Department of Education.

4. Lax Enforcement of Health, Safety, and Environmental Standards

Without regular inspections and clear penalties for violations, agencies cannot effectively protect the public and the environment. Yet President Bush has put an emphasis on "voluntary compliance" programs, where we must rely on the goodwill of polluters. As an outgrowth of this philosophy, the administration has proposed that EPA's enforcement budget be slashed dramatically and many responsibilities devolved to states (discussed later in the devolution section). In the past, enforcement has proven difficult to track and thus has received little attention from the public interest community, the media, and Congress. This is likely to further encourage Bush to see lax enforcement as a convenient way to defang regulatory protections without having to pay a heavy political price. This is equally true for civil rights programs. For example, the Citizens' Commission on Civil Rights demonstrated the difficulty in obtaining data about whether federal resources under the Elementary and Secondary Education Act were being properly targeted to disadvantaged children.[14] This problem will likely be exacerbated under the Bush Administration.

5. A More Aggressive Office of Management and Budget

All agency rules are subject to approval by the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). During the Reagan and Bush I Administrations, OMB used this review authority to routinely involve itself in substantively shaping rules protecting public health and the environment — often making them less protective at the urging of affected industry — even though it had no statutory authority and lacked the substantive expertise to do so. This administration appears headed back in this direction with the controversial confirmation of John Graham to head OIRA (the nomination was opposed by 37 senators). Graham, whose nomination was overwhelmingly opposed by the public interest community, has a long track record of siding with industry in regulatory disputes as the former head of Harvard's Center for Risk Analysis, once telling the Heritage Foundation that "[e]nvironmental regulation should be depicted as an incredible intervention in the operation of society." During the confirmation process, senators raised possible conflict-of-interest concerns, noting that Graham's center had received funding from numerous industry sources while producing research that was frequently beneficial to those funders. For instance, after receiving a contribution from AT&T Wireless, the center produced research that argued against regulation of cell phone use while driving.

6. Emphasis on Costs to Business in Regulatory Decisions

The administration has indicated it intends to put greater emphasis on monetized cost-benefit analysis in regulatory decisions (even though many governing laws expressly state that standards must be set based on what's best for public health). As OIRA administrator, Graham has the power to enforce such monetization, which he has long advocated. Since benefits are often difficult to put in terms of dollars and cents, monetization inevitably has the effect of deflating benefits relative to costs, which are frequently overstated.[15] Cost estimates are generally based on data supplied by industry and do not take into account adaptive effects, such as technological advancements, that inevitably reduce costs over time. With benefits understated and costs overstated, the process will be biased in favor of inaction. No doubt the Bush Administration will use such cost-benefit analysis to justify its failure to address public health, safety, and environmental problems, as well as its willingness to toe the industry line.

There are at least four problems that this new emphasis on cost-benefit will have for civil rights regulations. First, it is very difficult to monetize the benefits derived from civil rights regulations (every major civil rights regulation is subject to cost-benefit analysis). For example, how much is the value of protecting one's liberties or constitutional rights? Second, even when the value can be determined, agency methods for calculating benefits may not be well suited for the economic analysis. For example, will secondary and tertiary benefits be determined and valued? How are qualitative factors such as reducing inequities and strengthening justice included in the equation? Third, because costs are overloaded in favor of the regulated community, it will be harder for agencies to justify that the benefits outweigh the costs. Finally, cost factors will likely be increasingly used as determinative in whether an agency should proceed with a rule. Given the stacked deck, this will likely make it more difficult to proceed with civil rights protections.

7. White House Interference

The previous Bush Administration created the Council on Competitiveness — headed by Vice President Quayle — to further monitor agency rulemakings. The Quayle Council frequently injected itself into agency rulemaking and regulatory reviews at OMB in a constant effort to weaken regulatory protections. In this way, the Council — which, unlike the agencies, did not have to disclose any of its dealings — acted as a backdoor conduit for special interests seeking to stop agency action, out of public view. Upon taking office, President Clinton immediately terminated the Council on Competitiveness, but Bush's first months in office suggest some new form of White House engagement on regulatory matters. Vice President Cheney, for instance, has been very engaged on energy issues and regulations as they apply to utility companies. While this may not be in the form of a formal Quayle Council, there will likely be more and more substantive involvement by the White House in agency rulemakings.

8. Regulatory Budgeting

During the Reagan Administration there was discussion of a regulatory budget, that is, a means for capping the number or cost of regulatory protections. The idea received little support at the time, but resurfaced as a key component of the Republican Contract with America in 1994. Under that proposal, agencies would be required to identify the cost of all rules and lower such costs by a percentage each year.

The Bush Administration has not embraced either of the earlier proposals. Instead, they have talked about working with agencies during the budgeting process to include the costs of rules. This would allow OMB to give early approval or rejection of agency ideas. Much of this work will likely be tied to the new administration's emphasis on performance-based measures.

The boxes here provide a snapshot of how these regulatory priorities have begun to play out in the Bush Administration. Each of the charts tracks how the Bush Administration has reacted to Clinton era rules. The first section provides examples of rules that were revoked by the Bush Administration within the first six months

The Bush Regulatory Report

Safeguards Revoked in 2001

Contractor Responsibility — Two days after Christmas, with no one around to object, the Bush Administration quietly revoked a Clinton-era rule that promotes greater accountability for federal contractors — to make sure they comply with important public protections. Specifically, this contractor responsibility standard instructed government contracting officers to look at a bidding company's compliance with the law (including tax laws, labor laws, employment laws, environmental laws, antitrust laws, and consumer protection laws) before awarding taxpayer dollars.

Hard Rock Mining — The Bush Administration announced on October 25 that it would roll back environmental and land use protections for "hard rock" mining that were put in place shortly before President Clinton left office. The new, weaker standards were published in the Federal Register on October 30 and go into effect on December 31 of this year.

Roadless Rule — The Bush Administration signaled on July 10 (in an Advanced Notice of Proposed Rulemaking) that it will roll back a rule — completed at the end of the Clinton Administration — that bans new roads and logging in millions of acres of national forests, including much of Alaska's Tongass National Forest. Just weeks earlier, the administration tipped its hand by deciding not to appeal a dubious ruling by a federal judge in Idaho halting implementation of the ban. More recently, the administration has issued several Administrative Directives that cut directly against the roadless rule. Specifically, directives issued on December 20, 2001, eliminate a Clinton Administration moratorium on road building in uninventoried roadless areas. In addition, the directives remove any roadless protection for Alaska's Tongass National Forest and eliminate a provision of the rule that required regional and local forest service officials to conduct environmental and public reviews before logging, mining, and drilling could begin in roadless areas.

Air Conditioner Efficiency — On April 13, the Bush Administration announced its decision to revise and roll back standards established by the Clinton Administration for energy efficiency of air conditioners and heat pumps. The Clinton rule published in January after six years of development would have made new air conditioners 30% more energy efficient by 2006. The Bush Administration will lower that requirement to 20%. In an October 19 letter, obtained by OMB Watch, the EPA criticizes the Department of Energy (DOE) for ignoring the "strong rationale" for using the higher efficiency standard, while overstating the regulatory burden on manufacturers.

Kyoto Protocol — On March 27, the Bush Administration announced that it would withdraw from the Kyoto Protocol, the international agreement to curb pollution that causes global warming.

Chemical Accident Threats — On March 16, the Bush Administration withdrew plans initiated during the Clinton Administration to carry out legal mandates that would have eased public access to data on potential chemical fires and spills.

Carbon Dioxide — On March 14, the Bush Administration reversed the President's campaign pledge to regulate carbon dioxide emitted by electric power plants. Carbon dioxide released by power plants is a major threat to climate change, disrupting weather patterns and causing sea levels to rise, with unprecedented costs to the environment and human civilization.

Ergonomics Protections — On March 6, Congress used the Congressional Review Act, with a nod from the Bush Administration, to repeal an ergonomics rule that would have protected workers from repetitive stress injuries, such as carpal tunnel syndrome. During the ten years since then-Labor Secretary Elizabeth Dole initiated the ergonomics rulemaking, business interests and most congressional Republicans have continuously questioned the need for any ergonomics standard — despite numerous studies that have demonstrated its urgency.

Safeguards in Limbo

Wetlands Protection — Although the Bush Administration announced on April 16, 2001, that it will toughen protections for wetlands by requiring an Army Corps of Engineers permit for a broader range of projects that damage wetlands — including mechanized land clearing, ditching, and stream straightening — the Corps of Engineers issued a policy on October 31 that allows developers to offset losses of wetlands on one site by protecting wetlands, or even dry land, elsewhere.

Total Maximum Daily Loads (TMDL) Program — On October 18, 2001, EPA announced that a Clinton-era rule revising the TMDL Program, which requires states to identify and list waters not meeting water quality standards, will not become effective until April 2003. In the meantime, the administration is expected to make revisions to the standard.

Recordkeeping for Workplace Injuries — This rule, which updates Occupational Safety and Health Administration (OSHA) forms used by employers to list and detail workplace injuries and illnesses, was challenged in a lawsuit brought by the National Association of Manufacturers (NAM) early last year. The Bush Administration settled with NAM, and the rule went into effect on January 1, 2002. As part of the settlement, OSHA agreed not to cite violations within the first 120 days of the rule. OSHA is also delaying specific provisions in the rule that address recording of hearing loss and musculoskeletal disorders (ergonomics). The Bush Administration announced the delay on October 12, 2001, but said it planned to resolve those issues so that employers can begin reporting injuries for calendar year 2003.

Steel Erection Safety — On July 13, 2001, OSHA announced that the effective date for a rule to protect ironworkers from the dangers of steel erection work, in particular falls from great heights, was delayed six months to January 18, 2002. According to OSHA, the rule is expected to prevent 30 deaths and 1,142 injuries a year and save employers nearly $40 million annually.

Snowmobiling in Yellowstone — The Department of Interior announced on June 29, 2001, that it will reconsider a rule (completed at the end of the Clinton Administration) that would phase out snowmobile use in Yellowstone and Grand Teton national parks by 2004. The decision came out of a settlement agreement reached between Interior and snowmobile manufacturers, which had brought suit to stop the ban in Federal District Court in Wyoming.

Medical Privacy — The Bush Administration announced April 12, 2001 that it will move forward with new medical privacy standards that limit the information health care providers can divulge without a patient's consent. However, the administration also announced its intent to revise the standards, perhaps substantially, before they are fully implemented two years from now.

Dioxin Report — The chemical, beef, and poultry industries are fighting to further delay the release of an EPA study that shows consumption of animal fat and dairy products containing traces of dioxin can cause cancer. It is unclear whether the Bush Administration will publish it.

Safeguards Moving Forward

Arsenic — On October 31, 2001, EPA Administrator Christie Whitman announced the agency's decision to keep the 10 parts per billion (ppb) standard originally promulgated by the Clinton Administration for arsenic in drinking water. Back in March, the administration announced that it would drop the Clinton-era rule, but ultimately relented after intense political pressure and overwhelming scientific evidence supporting a strong standard.

Black Lung — On August 9, 2001, U.S. District Court Judge Emmett G. Sullivan rejected all of the National Mining Association's (NMA) challenges to numerous provisions of new black lung rules, marking a major victory for the United Mine Workers of America (UMWA) and the Department of Labor (DOL), which defended the standards. Previously, the Bush Administration had provided support to easing or eliminating sections of the rules – which govern the process by which black lung victims can claim their federal disability benefits – leading Sullivan to grant a preliminary injunction against them.

Lead — The Bush Administration approved a new rule on April 17, 2001, that will require thousands of industrial facilities to report toxic lead pollution released to air, land, and water. The new rule – finalized by EPA at the end of the Clinton Administration – lowers the threshold for reporting lead discharges under the Toxics Release Inventory.

Energy Conservation — On April 12, 2001, the administration announced that it would proceed with two Clinton-era energy conservation rules on washing machines and hot water heaters. Washing machines are to become 22% more efficient by 2004 and 35% by 2007 – a standard supported by the appliance industry. Gas water heaters are to be 8% more efficient and electric water heaters 4% beginning in 2004.

Salmonella in School Lunches — On April 4, 2001, the Bush Agriculture Department announced its intent to eliminate salmonella testing of ground beef served in federal school lunch programs, which had been pushed by the meat industry. Less than 24 hours later, however, Agriculture Secretary Ann Veneman announced that a mistake was made by a "low-level" employee, and that the testing, which began under President Clinton, would remain in place.

of office. Many of these rules generated national news. The second section provides some examples of rules that remain in limbo after the first six months of office. The final outcome will likely be decided in court. The third section provides some examples of rules that ran into an uncertain future in the Bush Administration, but ultimately were allowed to go forward. In some of these cases, such as with medical privacy rules, there are caveats suggesting that the rules may still be reviewed and weakened.

The following section provides a specific case example of regulatory "reform" as envisioned by the Bush Administration. We use the faith-based initiative as an example that is moving on two tracks – a legislative one and through waiver of administrative rules. The second approach is intended to bypass a Congress that may choose not to enact such legislation.

B. Faith-Based Initiative

As one of his first actions in the White House, George W. Bush established an "Office of Faith Based and Community Initiatives," which promotes the use of federal funds for social service programs run by religious organizations.[16] While faith-based organizations, such as Catholic Charities, have been receiving federal funds for years, they have traditionally been separate charitable entities, distinct from their houses of worship, and required to adhere to the same standards that govern all charities. The Bush plan allows for direct federal funding of religious congregations' programs. The initiative blurs the line between church and state, and early indications are it provides preferential treatment to religious groups.

The President's stated goal is to level the playing field and end "discrimination" against religious congregations in awarding federal grants. These statements beg the question of the appropriate role of religious congregations in administering federally funded social service programs. As the Friends Committee on National Legislation has pointed out, "The central issue in charitable choice is *not*, as its sponsors claim, discrimination against all programs sponsored by religious groups. Rather, the issue is the use of public funds to support programs that have a pervasive religious content."[17]

The primary component of the President's initiative is charitable choice, which refers to direct government grants to religious congregations for the purpose of carrying out government programs. In 1996 the first version was championed by then-Senator John Ashcroft and passed as part of welfare reform legislation. A similar provision was included in the Substance Abuse and Mental Health Services Administration's (SAMHSA) block grants passed in 2000. In all, the 106th Congress included the provision in seven bills, impacting programs on juvenile justice, mental health, fatherhood and child support, and community economic development.

The effects of these provisions have been minimal because participation by congregations has been low, and the Clinton Administration interpreted the law as prohibiting mixing federally funded services with worship activities or proselytizing. In contrast, the Bush Administration is aggressively pushing for a mechanism that will allow mixing religious activity with federal services.

There are both practical and constitutional problems inherent in the concept of funding congregational programs. Nonetheless, on August 16, 2001, the White House nudged the faith-based initiative forward with release of a report, *Unlevel Playing Field*, on barriers faith-based and community organizations face in competing for federal grants. The report was required by President Bush's January 29 creating five federal Centers for Faith-Based and Community Initiatives.[18] A second report is expected to focus on recommendations for change.

One bill (H.R. 7) to implement the President's agenda has passed the House of Representatives but faces closer scrutiny in the Senate. Since charitable choice legislation has bogged down in congressional difficulties, it is not surprising that the August White House report lays the groundwork for regulatory rather than legislative changes to achieve the President's faith-based agenda. "It is not Congress, but these overly restrictive Agency rules that are repressive, restrictive . . . [They] unnecessarily and improperly limit the participation of faith-based organizations" (page 14).

Overall, this report provides the basis for a "regulatory reform" initiative to undo a host of protections. Assuming this reform follows the tenets of the legislative agenda, we could see a system where:[19]

- People in need are forced to opt out of programs with religious content, placing an additional burden on their lives at a vulnerable time;

- Religious congregations that receive federal funds would be allowed to audit themselves, including self-certification of compliance with federal program requirements, such as nondiscrimination;

- Entire federal programs could be dismantled and replaced by vouchers, which would make it impossible for providers to plan and budget and assumes a nonexistent "marketplace" for many services;

- Religious congregations would be allowed to discriminate on the basis of religious affiliation when hiring staff to provide services under federal grants;

Barriers to Participation as Identified in White House Faith-Based Report

The White House report identifies 15 barriers to participation, the first six of which are specific to faith-based organizations:

1. A pervasive suspicion about faith-based organizations. The report states that there is an "overriding perception by Federal officials that close collaboration with religious organizations is legally suspect."

2. Faith-based organizations excluded from funding. There are some examples where religious organizations are prohibited from applying for funding. The report documents inconsistencies from program to program about who is eligible for funding.

3. Excessive restrictions on religious activities. "Federal grant programs can be inappropriately restrictive," requiring "faith-based providers to endure something akin to an organizational strip-search." The report gives an example of local pressure to remove or cover up religious art, symbols, and other items when a Head Start program is located in a house of worship.

4. Inappropriate expansion of religious restrictions to new programs. The report argues that federal departments rely on outdated case law in making decisions about participation of religious groups.

5. Denial of faith-based organizations' established right to take religion into account in employment decisions. The report makes a legal argument that faith-based organizations that get federal funding should be permitted to discriminate on the basis of religion when hiring employees. Other types of discrimination — race, color, national origin, gender — should not be permitted.

6. Thwarting charitable choice: Congress' new provision for supporting faith-based organizations. The report argues that HHS and DOL have done an inadequate job in implementing Charitable Choice legislation that has previously passed.

7. The limited accessibility of federal grants information. The report states that while most agencies announce grant availability in the federal register, it is "not everyday reading for small faith based and community groups."

8. The heavy weight of regulations and other requirements. There is a "dizzying array of statutory and regulatory requirements" that grantees face. (The fact that these rules are developed to ensure accountability and safety for those receiving services is not mentioned.)

9. Requirements to meet before applying for support. Grantees must have an "extensive financial and administrative management system." Organizations must already have an approved indirect cost rate before applying for grants, excluding many possible grantees. (This last point is factually inaccurate.)

10. The complexity of grant applications and grant agreements. The report notes grant applications are "repetitive and overly long, stating eligibility and other requirements more than once, lifting technical language directly from the authorizing statute, and including information from the legislative history that is only marginally pertinent . . ."

11. Questionable favoritism for faith-based organizations. There is an occasional bias toward faith-based organizations. In some cases, agencies have only opened grants to faith-based service providers.

12. An improper bias in favor of previous grantees. The report states that organizations that have already been awarded a grant in the past are favored in future grant applications. It points out that much of this "favoritism" exists because organizations that have already been awarded a grant are likely to know program officers and know where to find future grant announcements.

13. An inappropriate requirement to apply in collaboration with likely competitors. The report states that requiring grantees to coordinate their services "can be an important way to ensure that Federal funding achieves maximum results," but then goes on to say that coordination can also force organizations to work with competitors for the same grants.

14. Requiring formal 501(c)(3) status without statutory authority. The report implies that since there is no statutory requirement that an organization be a tax-exempt organization, there should be no need to require charitable 501(c)(3) status. It is indirectly suggested that articles of incorporation or even "demonstrating that the organization provides services in the public interest and uses its net proceeds to improve or expand such services" might be adequate.

15. Inadequate attention to faith-based and community organizations in the federal grants streamlining process. In legislation passed in 1999, Congress directed all major federal grant-making agencies to simplify and improve the grants process. The report states that insufficient outreach has been made to community and faith-based organizations in the reform process.

- Even though federal funds could not be spent on religious activity, worship and promotion of religious beliefs could be seamlessly woven into delivery of federal services; and

- No new federal resources would be made available for housing, drug treatment, job training, childcare or other federal services.

The White House report is based on very little data, possibly none from community-based organizations or grantees. The Department of Housing and Urban Development (HUD) was the only agency to seek public comment. According to the American Civil Liberties Union (ACLU), which analyzed the comments HUD received, only one of the 130 people filing comments expressed support for Bush's version of the faith-based initiative. The report also failed to recognize existing data. For example, a National Association of Community Action Agencies survey of community action agencies found that 40% contract with faith-based organizations to deliver services. This subgrant relationship with federal grantees is not acknowledged in the report.

Overall, the report appears to be a solution in search of a problem. It obfuscates what constitutes a faith-based organization. It appears that the White House is referring to religious congregations, but the report does not distinguish between congregations and their charitable affiliates, which are already eligible for federal money.

The "data" from the White House report largely differ from the results of a survey of nonprofits conducted in September 2000 by OMB Watch, the Advocacy Institute, the National Committee for Responsive Philanthropy, and The Union Institute.[20] Roughly 1,000 nonprofits from every state except one rated priorities for recommendations to strengthen the nonprofit sector. These nonprofits highlighted three broad areas: more resources for nonprofits, streamlining the federal grant process, and accountability.

The White House report does not address the need for more money for domestic programs or support to grassroots organizations to build their capacity. Nonprofit organizations regularly note that they are asked to provide services in partnership with the government but have been getting diminishing resources. A church or mosque will run out of funds for assistance just as quickly as a secular nonprofit or government agency. Where concrete help is needed — an affordable apartment, money for the gas bill, access to health care — Americans need more resources. The President seems to think that combining the limited assistance that is available with prayer will change the reality faced by low-income families.

But this approach to social services denies reality and shirks responsibility for what should be an important priority of government. Government has a larger role, since it is in a position to address the root causes of poverty through its domestic policies and spending priorities. Insufficient public investment in low-income communities is still insufficient, whether federal grants are awarded to religious congregations or other nonprofits.

The White House report does address some issues that would help streamline the grant process, such as reducing grant application burdens. But it does not address the other issues that nonprofits said are problems — the slow speed of reimbursement to smaller groups, grant reporting requirements, and the need for uniformity and simplification in all financial reporting (e.g., IRS Form 990, audits, grant reports).

The report moves in the wrong direction on accountability by suggesting that grantees need not be tax-exempt 501(c)(3) organizations. More accountability problems are raised by provisions of H.R. 7, which would eliminate or sharply reduce audit and accountability requirements. Government audits would be limited to government funds. (Most nonprofits face single-entity audits, meaning that the audit covers all organizational activities. This would not be true for faith-based grantees. Only the federal grant funds would be audited.) However, H.R. 7 also provides for annual "self-audits," apparently including programmatic operations as well as financial transactions. This provision would eliminate any meaningful public accountability, or enforcement of requirements such as nondiscrimination against beneficiaries who do not wish to participate in worship activities. This self-audit is inconsistent with grant management principles and procedures and would create a special set of rules for faith-based organizations over other types of nonprofit organizations.[21] The most efficient way to create a workable accountability system is to require congregations to create a separate organization, which could be affiliated with the congregation but not part of it. It also would protect the congregation from liability for any mishaps that occur as a result of publicly funded program activities.

A group of faith-based organizations[22] has developed a code of conduct for congregations that receive federal funds to run service programs. The code requires that congregations only participate in federal programs to the extent the activity is part of their overall mission. It also requires compliance with federal regulations, transparency with the public, protection of their religious character, and financial accountability. Coercion of beneficiaries to participate in religious activities is prohibited.[23]

The issue of effectiveness is central to the debate, although little attention has been paid to it. Proponents of a pervasively religious approach to social services claim it is more effective than programs traditionally offered by government. These claims rarely address the traditional role of secular nonprofits in providing social services, but assume religious groups get better results than community-based nonprofits. President Bush has stated that faith-based programs achieve "uncommon results," but there is very little evidence that either supports or contradicts these claims. Most of what has been offered is anecdotal. There is a small body of research on the impact of religion on behavior, which tends to show that religious devotion deters some behaviors but not others, and that faith-based programs may be better at rehabilitation than deterrence. However, other studies indicate that religion is no more statistically significant in deterring crime or rehabilitating addicts than educational ability and aspiration, gender, or family and community connectedness. The most that can be said about the few studies focusing on this issue is that the findings are inconclusive.[24]

Although the administration says federal programs will be judged according to their effectiveness, no detail has been offered on how this will be done, how standards will be developed and outcomes defined. The administration should consult with nonprofits to establish appropriate performance measures and goals for federally funded social service programs, and ensure that evaluation factors are equally applied to faith-based and secular nonprofits. There should be no presumption that a "faith factor" makes a program more effective.

The administration has placed a heavy emphasis on the Government Performance and Results Act (GPRA) to emphasize performance-based decisions. Extending GPRA requirements to federal grantees raises at least three issues. First, who decides what measures performance will be based on? GPRA does not require stakeholder involvement in the development of agency performance measures. Second, GPRA requires agencies to develop *quantifiable* performance measures; in fact, agencies must seek special permission to use qualitative measures. In the area of social services, this may present enormous challenges. Third, it may mean that nonprofits begin to provide services in a manner that meets the quantifiable measures in order to assure that they do not lose their grants. In some cases, this may mean no longer serving the hardest to serve.

The Bush Administration has also emphasized relaxing programmatic standards. Charitable choice legislation, such as under SAMSHA, allowed religious congregations to substitute "life experience" for training and education in determining the qualifications of employees of the faith-based groups. A provision like this could be a disaster for drug and alcohol treatment centers, where qualified medical supervision is often critical to the patient's health. For example, in Texas, where Bush implemented many elements of charitable choice, a drug rehabilitation program approached drug addiction as a moral failing, not a disease, and provided Bible reading and prayer as treatment. This could be deadly for a patient who is encouraged to quit a heroin addiction "cold turkey" and offered prayer instead of methadone. The provision also creates a more lenient standard for congregations than is applied to secular nonprofits, a preference that violates constitutional standards.[25]

A sad example from Texas underscores this concern. In 1997 then-Governor Bush exempted faith-based groups from state health and safety regulations. Roloff Homes, which ran a residential program for troubled youth using Christian teachings, had been forced out of Texas years earlier after complaints of physical abuse of teenage girls became public. They returned to Texas and reopened as a faith-based provider in the late 1990s. Within three years two employees were arrested for physical abuse that landed one teenage boy in the hospital. A June 21, 2001, *Washington Post* story reports that a jury convicted the employee in charge of unlawful restraint.[26] The Texas legislature recently allowed the law exempting youth homes from health and safety standards to expire.

There is concern that unless specifically addressed, congregations could be immune from federal safety regulations, such as OSHA requirements or Food and Drug Administration (FDA) rules. This could put the federal government in the position of funding daycare centers with unsafe electrical systems or soup kitchens without adequate sanitation facilities, endangering the recipients of the services as well as employees. H.R. 7 may address this with a provision that says religious organizations providing federal services "shall be subject to the same regulations as other nongovernmental organizations . . . for the use of such funds and performance of such programs." However, the Bush Administration's regulatory "reform" initiative may undo some of the programmatic standards.

While each of the above concerns are civil rights issues, three other aspects of the faith-based initiative raise specific civil rights issues. These include beneficiary rights, hiring discrimination, and conversion of entire programs to vouchers. Each is discussed below.

The most important stakeholders in the debate on the President's faith-based initiative are the people in need of assistance offered through federal programs. These beneficiaries are forced by circumstances or even court orders to seek help with meeting basic needs, such as food, shelter, and health care. The system that offers this help should be easily accessible and equally available to all who qualify. It should not further burden beneficiaries with unnecessary delays or administrative requirements.

Charitable choice fails to meet this standard by placing the burden on program beneficiaries to object to placement in a religious program, participation in worship activities, or being subjected to proselytizing. This burden makes charitable choice far from neutral, by creating a Catch-22 for our most vulnerable households. People in need of service usually do not have the option of objecting to a particular service provider and starting over. They face real and immediate crises, and cannot afford to risk having the lights turned off or delaying medical treatment in order to seek a secular alternative. The opt-out approach places an affirmative burden on exercise of their religious freedom. It is not realistic or fair to expect beneficiaries to speak up and object to religious activities when they are vulnerable and seeking help.

Usually a household must go through a screening process conducted by a service provider to qualify for assistance. During this process all applicants should be informed of the religious nature of any service offered by the provider, and given information about secular alternatives, whether they ask for it or not. Once beneficiaries begin participation in a program, they should not be required to participate in worship activities, either actively or passively. As a practical matter it would be difficult, if not impossible, for federal agencies to monitor religious grantees for compliance with this requirement, or to enforce it. Self-certification of compliance, as called for in H.R. 7, is insufficient to protect the religious freedom of beneficiaries.

Pressure to participate in religious worship is the inevitable outcome of mixing government services with religious activity. But that is what the administration wants to allow, and it is the only reason to promote charitable choice legislation.

Under the Bush Administration's proposal, congregations would be permitted to discriminate on the basis of religious belief or affiliation in hiring for positions funded with federal grants. However, provisions in the bill reauthorizing the Elementary and Secondary Education Act allowing private groups to provide supplemental educational services do not permit discrimination in employment. H.R. 7 also allows this practice, despite changes that eliminated a congregation's ability to base hiring decisions on religious practices. Section 702 of the Civil Rights Act of 1964 permits congregations to base hiring decisions on religious factors (for example, a Jewish temple does not have to consider hiring a Methodist to be its rabbi). However, the intent of this exemption from civil rights laws is to respect the character of religious activities. Since federal programs are not supposed to include religious activity, the rationale for the exemption does not extend to staff hired to implement public programs. This provision was included in the original charitable choice legislation in the welfare reform and is currently the subject of litigation.

Proponents of charitable choice have sought to solve the many constitutional problems and contradictions inherent in the plan by proposing social service vouchers. The theory is that people in need will be able to shop for services, and only choose a program with religious content if they wish to share in the religious activity. While vouchers create an appearance of choice by providing federal dollars directly to program beneficiaries, the net result is the same as directly funding pervasively religious services.

The voucher concept assumes there is a social service marketplace, and that service providers can afford to front the money for federal programs in the hope that people will come with their vouchers, and that vouchers will be swiftly paid by federal agencies. None of these assumptions bears up to reality. Social service agencies are more often than not in short supply. While there may be a limited market for day care or affordable housing, there is no market for many services, such as heating assistance or homeless shelters.

Vouchers also destroy a provider's ability to plan and budget effectively, since there is no way of knowing how many clients may come through the door. Resources that are needed for services would have to be spent on advertising. Only the largest agencies could participate, because the small, grassroots groups the President says he wants to involve could never afford to hire staff, lease office space, or purchase equipment and supplies without knowing whether or not they would ever be reimbursed.

The federal government would abdicate responsibility for ensuring an adequate infrastructure for administering federal programs if it left this issue up to a non-existent marketplace. What would happen if no providers were able to offer services in a particular city? In addition, a voucher system creates new administrative headaches, since qualifications for providers must be established and a process for approval of agencies and expenses would be necessary for accountability purposes. In the end, vouchers create more headaches than they avoid.

Despite claims that the goal of charitable choice is to achieve neutrality in awarding grants and level the playing field for congregations, the rhetoric and follow-up activity to the President's faith-based initiative clearly demonstrate a desire to redirect federal grants to religious congregations whenever possible. Secular nonprofits, including those allied with denominations or interfaith providers, are relegated to the status of "other" groups. They might be surprised (or offended) to hear themselves described by the President as "good people of no faith at all."[27] The White House report, *Unlevel Playing Field*, unfairly criticizes nonprofits that currently receive federal grants: "there is a striking disjunction between the service organizations that federal grant funds predominantly support, and the organizations that actually provide most of the critical social services."[28]

Any preference shown toward religious congregations in grant activities, from outreach to potential applicants and technical assistance with completing grant applications to the awarding of grants, would violate even the most flexible of standards for separation of church and state. It is one thing to declare religious groups should not be excluded, but another altogether to actively favor them in the process, thereby truly creating an unlevel playing field.

III. Devolution

Going all the way back to the Civil War and extending through the days of Jim Crow, "states' rights" has served as the battle cry for those hostile to civil rights. Today, the "states' rights" mantra is frequently thrown around by our leaders, including President Bush, with no apparent connection to civil rights. Yet the connection remains.

Beginning with the Contract with America in 1994, Congress has aggressively pushed to "devolve" more and more responsibility to the states. While giving states more responsibility in certain areas may not always be a bad thing, this push has been deeply ideological, with devolution seen as an end in itself. In some cases, the Clinton Administration resisted this new states' rights movement, and in others, it relented, as in the case of welfare reform.

Now with Bush in office, the devolution crusaders think they have a more steady ally, which could be an ominous sign for civil rights protections. In particular, it will be important to watch the actions of the Bush Administration in the following areas:

A. Judicial Appointments

Since the mid-1990s, the Supreme Court (through a series of 5 to 4 votes) has been flirting with a radical notion of federalism that seems to have us headed back to the Articles of Confederation — leaving the federal government fewer and fewer powers to protect civil rights. For instance, last year the Court ruled in separate cases that state government employees were constitutionally prohibited from suing states in federal court under the Age Discrimination in Employment Act and the Americans with Disabilities Act. Also last year, the Court struck down the Violence Against Women Act – which creates a civil rights remedy for victims of sexual violence — again citing states' rights principles.

This makes future judicial appointments — and not just those to the Supreme Court — extremely important. Ominously, President Bush has said he would model his judicial choices after Clarence Thomas and Antonin Scalia, the two most aggressive proponents of the states' rights agenda on the Supreme Court.

B. Federalism Initiatives

Currently, the Bush Administration is in the process of drafting a new executive order on federalism that would seek to defer regulatory authority to states. The first federalism executive order (E.O. 12612) was issued by President Reagan on October 26,1987, mandating that agencies conduct a federalism assessment for rules sent to OMB for review. That order was kept in place until May 14, 1998, when President Clinton issued his own version, Executive Order No. 13083.

Even though the Reagan executive order had gone largely unenforced for years (even in the Reagan and Bush Administrations), Clinton's action — intended to make federalism relevant — drew fire from the National Governors' Association (NGA) and the National Conference of State Legislatures (NCSL), as well as conservative groups, none of which had ever raised a peep about the lack of enforcement of the Reagan order.

The Heritage Foundation and the Free Congress Foundation, for instance, claimed that the President was not only attempting to enhance the strength of the federal government but attempting to "legitimize all the abuses of power promulgated by a gaggle of federal agencies since the time of FDR."[29] Or, as the Heritage Foundation said, "President Clinton's new executive order on federalism is a serious affront to the federalist framework established in the U.S. Constitution."[30]

This created momentum for legislation in Congress to codify principles of the Reagan executive order.[31] This effort, however, was opposed by the Clinton Administration, the public interest community, and perhaps surprising to some, the business community, which does not want to have to comply with 50 different standards in 50 different states. With this broad opposition, the legislation ultimately died.

Yet throughout the battle, the Clinton Administration continued to negotiate with NGA and NCSL on yet another federalism executive order more to their liking, which it also hoped would undermine the push for legislation. The result was E.O. 13132 — put into effect on August 4, 1999 — which, while not pleasing conservatives, did assuage the organizations representing state and local governments. These organizations, including NGA and NCSL, sent a letter to President Clinton on August 3, 1999, thanking him for "consulting extensively with us" prior to the issuance of the new executive order. They also said, "The executive order constructively responds to the concerns we raised during the consultations and provides to federal agencies strengthened guidance on the importance of federalism and state and local government authority. We welcome your commitment to implement and enforce this executive order."

Specifically, the order directs federal agencies to:

- Closely examine statutory authority supporting any action that would limit the policymaking discretion of state and local governments and carefully assess the necessity for such action;

- Construe federal statutes to preempt state law only where the exercise of state authority directly conflicts with the exercise of federal authority under the federal statutes or there is other clear evidence to conclude that Congress intended the agency to have the authority to preempt state law;

- Not submit legislation that would directly regulate the states in ways that would interfere with functions essential to the states' separate existence; and

- Not attach to federal grants conditions that are not reasonably related to the purpose of the grant.

Conservatives, however, have been stewing over the inadequacies of the Clinton executive order. Accordingly, the Bush Administration quickly established a Federalism Task Force under the leadership of a top White House aide, John Bridgeland. The Task Force has decided that it will recommend a new federalism to replace the Clinton version, and that it should be completed some time in the fall of 2001.

The new executive order reportedly instructs federal agencies to "refrain, to the maximum extent, from establishing uniform, national standards for programs and when possible defer to the States to establish standards"[32] — a philosophy the Sept. 2 *Washington Post* reports will be overseen by a new executive branch entity, suggesting the administration's commitment to enforce such principles.

Of course, it will almost always be "possible" to defer to states. And in some cases, where states set stronger standards than the federal government, it will be preferable. However, on many occasions it will not be appropriate. The first responsibility of the federal government should not be to protect the discretion of states, as the above quote implies, but rather to serve the broad interests of the American people. In the case of worker health and safety, environmental and consumer protections, or civil rights, this frequently means setting strong national standards. "States' rights" should not be an excuse for the federal government to abdicate its responsibility in these areas.

It should also be pointed out that national standards can help protect the interests of states. Some states may want stronger health and safety standards but fear losing business to other states with more relaxed standards. National leadership can help prevent a race to the bottom. Moreover, one state may be adversely affected by pollution from a neighboring state yet powerless to change the situation. This again necessitates federal intervention.

There are also other very legitimate reasons to establish uniform, national standards. Common methods of measurement across states are often needed to adequately assess government performance, which has been one of the key lessons in implementing the Government Performance and Results Act — a stated priority of the administration. Indeed, the administration at least seems to recognize this in the context of its education bill, which seeks new national testing.

Any federalism executive order should recognize these legitimate and necessary reasons for the federal government to set strong national standards. States deserve to be at the table and have their concerns heard, but true federalism demands national leadership.

C. Budgetary Allocations

Devolution advocates have been strong proponents of block grants to states — funds that are provided with very few strings attached and minimal oversight. In the past, this has given way to abuses, with states shifting funds from one area, such as health care or education, to another, such as road construction.

Bush has expressed sympathy for block grants, often saying the federal government should just "get out of the way." Yet the federal government has a responsibility to taxpayers to make sure that money is spent in the intended way. And again, Bush's rhetoric assumes there is no legitimate need to set national priorities.

Budgetary decisions to devolve responsibility to states also frequently impact the quality of federal regulatory protections. For instance, the adminis-tration's budget proposed cutting EPA's enforcement staff by 8%, or 270 positions, while providing $25 million in new grants to states for enforcement activities.[11] This move came despite recent evidence that many states do not adequately enforce environmental protections. According to an Aug. 22 report from EPA's inspector general, states are doing a poor job of monitoring and punishing water polluters, and nearly 40% of the nation's waters are not meeting standards set for them. Moreover, at least six states failed to report numerous serious violations of the Clean Air Act, according to a 1998 audit by the EPA inspector general.

Such a move to devolve enforcement may have a significant impact on the ability of the federal government to hold state and local governments accountable. Some in the civil rights community have already begun tracking enforcement issues. However, this will become even more difficult — yet even more imperative — as resources are devolved to states and localities. The difficulty will involve several factors.

First, will states and localities be given the resources that are needed to implement enforcement initiatives? Many states have complained about unfunded mandates, and many of those complaints have been legitimate. The federal government mandates a requirement but leaves it to the states to implement without the money to properly do so. Many of these mandates are strongly supported by the civil rights community. To the extent that any of these requirements are devolved to the states, it will become an issue of whether the states can afford to properly implement the requirement.

Second, will states and localities be given the criteria by which to enforce matters? Generally, when the federal government block grants resources or devolves programmatic responsibilities, there has been an effort to grant full responsibility to the state or local government. For example, federal grant rules, which carry non-discrimination requirements, are not in effect for block grant funds. The states must develop their own rules, if they choose to. When it comes to devolving program responsibilities to the states, will the federal government articulate the standards by which the programs are to be judged and require the states to track those standards? This is part of the current debate about educational reform and will likely be a part of most future federal debate.

Third, even if there are standards and resources to enforce federal intentions, how will information be collected and disseminated? Congress has asked federal agencies to reduce information collections by 5% per year under the Paperwork Reduction Act. While that requirement has been unenforceable, the law is up for reauthorization. Conservatives, along with industry, are ramping up to make that an enforceable requirement. Even if the requirement of 5% reduction were not there, the devolution model suggests granting major powers to the intergovernmental "partner." Does this mean that 50 states might have 50 different ways of collecting information that may be necessary? The answer to this question has enormous impact. For example, let's assume there is an effort to track employment discrimination by company. If each state collects the information it raises in a slightly different manner it will be impossible to create a national perspective on employment discrimination or possibly even compare companies that reside in different states. Moreover, the devolution of information collection could also impair the public's right-to-know, which has accelerated in the age of the Internet.

D. Civil Society

Today it is often difficult to discern the difference between the devolution of responsibility from federal to state and local governments and the shifting of federal tasks to the nonprofit voluntary sector. Both are ideological objectives fostered by conservatives and effectively manifested in the Bush 2000 Presidential campaign.

The civil society debate was stirred by Robert Putnam's 1995 thesis that "social capital" in America is declining, and, as he put, we are "bowling alone."[14] Putnam noted that:

- Voter participation has declined rapidly since the 1960s (nearly 25% drop in voter turnout);
- Participation in town halls, and public or school meetings, dropped by one-third from 1973 to 1993; and
- There have been equal or greater declines in responses to questions about attending political rallies or speeches, serving on a committee of some local organization, or working for a political party.

According to Putnam, "By almost every measure, Americans' direct engagement in politics and government has fallen steadily and sharply over the last generation, despite the fact that average levels of education — the best individual-level predictor of political participation — have risen sharply throughout this period." Many have effectively rebutted the Putnam thesis, noting that his measures of participation are inadequate.[15] However, conservatives have noted that Putnam's data suggest that America has lost the spirit that Alexis de Tocqueville saw when he visited the United States in the early part of the 19th century.

Tocqueville was impressed by the role of civic associations and considered them as key to making democracy work. "Americans of all ages, all stations in life, and all types of disposition are forever forming associations," he wrote. "There are not only commercial and industrial associations in which all take part, but others of a thousand types — religious, moral, serious, futile, very general and very limited, immensely large and very minute. . . . Nothing, in my view, deserves more attention than the intellectual and moral associations in America."[16] More recent observers, such as John Gardner and Brian O'Connell, have made the same point, adding that nonprofit involvement in public policy is critical to the healthy functioning of democracy, making it possible for the voice of all Americans to be heard.[17]

Conservatives have built on this, arguing that to reinvent America we must downsize the federal government and allow greater local citizen control, possibly through nonprofit organizations — a return to the good old days of what Tocqueville saw. Theda Skocpol criticizes this mindset by providing some historical context to the "Tocqueville romanticism," as she calls it.[18] The Tocqueville direct democracy model assumes that voluntary groups were created on their own at the local level to associate to get things done outside of government or as an alternative to government.[19] According to Skocpol, this is not an accurate picture: "[R]esearch on America in the early 1800s shows that religious and political factors also stimulated the growth of voluntary groups. . . . In addition, the American Revolution, and the subsequent organization of competitive national and state elections under the Constitution of 1789, triggered the founding of newspapers and the formation of local and translocal voluntary associations mush faster and more extensively than just nascent town formation can explain."

After recounting a number of historical factors, she concludes, "so Tocqueville romanticists are wrong to assume that spontaneous social association is primary while government and politics are derivative. On the contrary, U.S. civic associations were encouraged by the American Revolution, the Civil War, the New Deal, and World Wars I and II; and until recently they were fostered by the institutional patterns of U.S. federalism, legislatures, competitive elections, and locally rooted political parties." She warns that conservatives are using the Putnam literature to invigorate a new sense of local, nongovernmental control that is not based on historical accuracy.

This academic perspective may help to frame the language and policies of the Bush Administration. On the one hand, the administration wants to devolve federal responsibility and on the other it wants to downsize government as Representative Dick Armey stated at the beginning of this article. Talking about the valuable role of nonprofits, whether faith-based or otherwise, comes with no new resources and generally with the notion of dumping federal responsibilities on the private sector. The mantra is local control. All of this is what we classify under our description of devolution — much of it overlapping with the first two parts of this paper.

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Endnotes

[1] All are employees of OMB Watch in Washington, D.C. Cate Paskoff also contributed to this article.

[2] A closer look reveals that nonmilitary spending drops from 15.4% to 15.2% to 14% of GDP. If you then look at the percentages for all domestic and international discretionary spending (excluding military spending), which encompasses almost all of government's activities except for mandatory programs like Social Security, the decrease is even more startling.

[3] All figures from the *Historical Tables* volume of the *Budget of the United States Government, Fiscal Year 2002*.

[4] Theda Skocpol, *The Missing Middle: Working Families and the Future of American Social Policy*, A Century Foundation Book (New York: W.W. Norton 2000).

[5] Robert Kuttner, "Opposition as Opportunity," 11 *The American Prospect* (2000).

[6] Robert B. Reich, "On Thinking Bigger," 11 *The American Prospect* (1999).

[7] The estate tax currently only impacts those estates valued at over $675,000. That "exemption" would have increased to $1 million in 2006. Under the new tax law, prior to full repeal, the exemption will increase to $3.5 million. While estate tax rates can be as high as 55%, the actual effective tax rate is much lower. The new tax law (P.L. 107-16) reduces marginal rates to 45% before full repeal.

[8] Message to Congress by Franklin D. Roosevelt, in H.R. Rep. No. 1681, 74th Congress, 1st Session at 2 (June 19, 1935), qtd. in James R. Repetti, "Democracy, Taxes, and Wealth," 76 *New York University Law Review* 825-873 (2001).

[9] Andrew Carnegie, *The Gospel of Wealth and Other Timely Essays* (Cambridge, MA: Belknap Press of Harvard University Press 1962).

[10] Reactions came from the academic community as well as syndicated columnists and journalists. See New York University Professor Dalton Conley's Apr. 5, 2001, article, "How to Widen the Black-White Wealth Gap," in the online magazine Salon.com at *<http://www.salon.com/politics/feature/2001/04/05/black_wealth/>* or journalist Jonathan Chait, "Painted Black," *The New Republic Online* (Aug. 16, 2001) at *<http://www.thenewrepublic.com/082701/chait082701_print.html>* and Michael Kinsley, "Dead Wrong," *Slate* (Apr. 5, 2001) at *<http://slate.msn.com/readme/01-04-05/readme.asp>*.

[11] Full and immediate repeal of the tax was estimated by the Joint Committee on Taxation (JCT) to cost more than $660 billion over the next ten years. JCT estimated that the repeal plan that was finally signed into law on June 7, 2001, which modifies exemption levels and tax rates with one year of full repeal, will cost $138 billion over the next ten years — more than half of which will be lost in 2011, after the first full year of repeal. Source: Joint Committee on Taxa-

tion, *Estimated Budget Effects of the Conference Agreement for H.R. 1836* (JCX-51-01), May 26, 2001, *<http://www.usajournal.com/new_federalism.htm>*.

[12] There is irony here since it has been industry that has argued for national standards when it sees multiple or redundant standards being developed in the 50 states. See the history of hazard communications in the workplace, for example.

[13] Memorandum from Andrew Card, "Regulatory Review Plan" (Jan. 20, 2001). OMB Director Mitchell Daniels issued a memo to agencies on Jan. 26, 2001, that provided additional details on implementing the Card memo.

[14] Citizens' Commission on Civil Rights, *Title I in Midstream: The Fight to Improve Schools for Poor Kids* (Washington, D.C.: Citizens' Commission on Civil Rights 1999).

[15] *See, e.g.*, Eban Goodstein and Hart Hodges, "Polluted Data: Overestimating Environmental Costs," *The American Prospect*, at 64 (Nov./Dec. 1997); Office of Technology Assessment, *Gauging Control Technologies and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytical Approach* (1995).

[16] On January 29, 2001, President Bush issued two executive orders. One created an Office on Faith-Based and Community Initiatives within the White House. The other created faith-based centers at the Departments of Justice, Labor, Education, Health and Human Services, and Housing and Urban Development.

[17] FCNL *Perspectives*, No. 4 (Feb. 2001).

[18] Each departmental faith-based center was to submit a report to the White House Office of Faith-Based and Community Initiatives, headed by John DiIulio, who announced his resignation a day after the report was released. The report from each center was to include an analysis of barriers to the "full participation of faith-based and other community organizations in the delivery of social services," a summary of technical assistance provided by the department to help in preparation of grant applications, and annual performance indicators and measurable objectives for departmental action. The report is to be released annually.

[19] The legislative agenda is articulated in H.R. 7, as passed by the House of Representatives.

[20] Advocacy Institute, National Committee for Responsive Philanthropy, OMB Watch, and The Union Institute, *Nonprofit Agenda: Recommendations to President George W. Bush to Strengthen the Nonprofit Sector* (Jan. 22, 2001). Available at *<http://www.ombwatch.org/npagenda/>*.

[21] *See*: (a) cost principles such as OMB Circular A-122, "Cost Principles for Non-Profit Organizations"; (b) administrative requirements such as OMB Circulars A-102, "Grants and Cooperative Agreements with State and Local Governments," and A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations"; and (c) audit requirements such as OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," which was issued to implement the Single Entity Audit Act.

[22] "A Code of Conduct," *The Christian Century*, at 2000 (July 5, 2000), WL 9857739.

[23] *Id.*

[24] For a summary of this research *see* Lewis D. Solomon and Matthew J. Vlissides, Jr., The Progressive Policy Institute, *In God We Trust? Assessing the Potential of Faith-Based Social Services* (Feb. 2001), at *<http://www.ppionline.org>*.

[25] It violates constitutional standards because it gives a preference that is not related to maintaining church-state separation. In this way it is different from exemptions such as allow-

ing congregations not to file IRS annual tax forms (*e.g.*, Form 990).

[26] Hanna Rosin, "Faith-Based Youth Homes' 'Lesson'; Texas Backs Away from Unregulated Programs After Abuse Charges," *The Washington Post*, June 21, 2001, at A3.

[27] Forward to *Rallying the Armies of Compassion.*

[28] *Unlevel Playing Field* at 7.

[29] Jon E. Dougherty, "The New Federalism," *USA Journal Online* (1998). Available at *<http://www.usajournal.com/new_federalism.htm>.*

[30] Executive Memorandum No. 536 from Adam D. Thierer, The Heritage Foundation, "President Clinton's Sellout of Federalism" (June 25, 1998).

[31] The legislation (S. 1214 and H.R. 2245 of the 106th Congress) contained two main parts. First, it required agencies to conduct federalism assessments for their regulatory proposals — which unlike the previous executive orders would be judicially reviewable and could be challenged in court. Second, it sought to override years of court doctrine on preemption. Where Congress or an agency intended to preempt state or local law, the legislation required that there be a specific statement of preemption within the bill or rule. Where no such statement appears, state and local laws would have presumed authority. This part of the legislation raised serious judicial concerns and was strenuously opposed by the Clinton Justice Department.

[32] This was reported in the Bureau of National Affairs' *Daily Report for Executives* on Aug. 2, 2001.

[33] Funding was restored by the Senate, but the Bush proposal survived in the House. The issue must now be resolved in conference committee.

[34] Robert D. Putnam, "Bowling Alone: America's Declining Social Capital," 6 *Journal of Democracy* 68 (1995).

[35] *See for example,* Michael Schudson, "What If Civic Life Didn't Die??" 7 *American Prospect* (1996). This article is part of a series called "Unsolved Mysteries: The Tocqueville Files."

[36] Alexis de Tocqueville, *Democracy in America*, at 513-17 (J.P. Mater ed., Garden City, NY: Anchor Books 1969).

[37] *See,* for example, Brian O'Connell, The Foundation Center, *People Power: Service, Advocacy, Empowerment* (New York 1994). In an article summarizing existing research about nonprofit advocacy, Elizabeth Reid argues that nonprofits "offer citizens many choices for participation and action. Nonprofits are places in civil society where people associate with each other and join mutual action, including political action, to address their concerns and interests." *See* Elizabeth J. Reid, "Nonprofit Advocacy and Political Participation," Nonprofit Organizations and Government: The Challenge of Civil Society conference paper, Urban Institute (June 9, 1998).

[38] Theda Skocpol, "Unravelling from Above," 7 *The American Prospect* (1996).

[39] Peter Dobkin Hall provides historical context for the assertion why the Tocquevillian model has been used by conservatives who believe in less government. His main point is historically those who wanted to roll back government believed the alternative was the growth of voluntary associations. "Initially, the traditionalists — or Federalists, as they came to be known — favored strong government and advocated the delegation of state power to groups of respectable individuals for public purposes. By the 1790s these purposes included eleemosynary ones such as the establishment of schools, colleges, and hospitals, as well as such commercial enterprises as banks, bridges, canals, and turnpikes. The dissenters, who came to be known as the Democratic Republicans, favored minimal government and looked to individuals and unincorporated voluntary associations to perform the basic tasks of production and social palliation" (at 7).

About the Authors

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William L. Taylor is a lawyer, teacher, and writer in the fields of civil rights and education. He practices law in Washington, D.C., specializing in litigation and other forms of advocacy on behalf of low-income and minority children. He began his legal career in 1954 working for Thurgood Marshall and the NAACP Legal Defense and Education Fund. In the 1960s he served as General Counsel and later as staff director of the U.S. Commission on Civil Rights, where he directed major investigations and research studies that contributed to the civil rights laws enacted in the 1960s. In 1970, he founded the Center for National Policy Review, a civil rights research and advocacy organization funded by private foundations that he directed for 16 years. Mr. Taylor has long been a leader of the Leadership Conference on Civil Rights and currently serves as Vice Chairman. He was also a founder and now serves as the Acting Chair of the Citizens' Commission on Civil Rights.

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Working Papers

The Federal Courts

Chapter 3

Federal Judicial Nominations and Confirmations During the Last Two Years of the Clinton Administration

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Chapter 4

Recent Supreme Court Decisions Affecting Congress' Ability to Redress Employment Discrimination

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Segregation in Education

Chapter 5

The New Legal Attack on Educational Diversity in America's Elementary and Secondary Schools

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Chapter 6

Diversity in Higher Education: A Continuing Agenda

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Segregation in Housing

Chapter 7

Urban Fragmentation as a Barrier to Equal Opportunity

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Chapter 8

Federal Fair Housing Enforcement at a Crossroads: The Clinton Legacy and the Challenges Ahead

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Political Participation

Chapter 9

The Current Civil Rights Challenge for the Growing Latino Community: Inclusion and Participation in Political Life

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Chapter 10

Voting Rights

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Affirmative Action and Employment

Chapter 11

Affirmative Action in Public Contracting: The Final Years of the Clinton Administration

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Chapter 12

Equal Employment Opportunity: EEOC and OFCCP

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Criminal Justice

Chapter 13

Federal Action to Confront Hate Violence in the Bush Administration: A Firm Foundation on Which to Build or a Struggle to Maintain the Status Quo?

Michael Lieberman has been the Washington Counsel for the Anti-Defamation League since January 1989. He has written widely about the impact of hate crimes and has been actively involved in efforts to secure passage of a number of federal and state hate crime statutes. Mr. Lieberman has participated in seminars and workshops on response to violent bigotry and has served on Advisory Boards for hate crime projects funded by the Department of Justice, the Department of Education, and the Department of Housing and Urban Development.

Chapter 14

Racial Disparities in the American Criminal Justice System

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Lesbian and Gay Rights

Chapter 15

Mixed Reviews on Lesbian and Gay Rights for Bush's First Year

Lou Chibbaro, Jr., is a news reporter for *The Washington Blade*, a weekly newspaper that covers issues of interest to the gay community. Chibbaro reports on gay civil rights and AIDS related issues that emerge from Congress, the White House, and federal agencies and departments. He also reports on local and national elections, including U.S. Presidential elections. He has observed the Bush Administration's actions and positions on gay and AIDS issues as the *Blade*'s White House correspondent.

Discriminatory Practices in Education

Chapter 16

High Classroom Turnover: How Children Get Left Behind

Chester Hartman (*chartman@prrac.org*) is the President/Executive Director of the Poverty and Race Research Action Council in Washington, D.C. PRRAC is a national public interest organization that networks between the civil rights and anti-poverty communities, and provides support for and dissemination of social science research on the intersections of race and poverty that in turn is designed to support a planned advocacy agenda. This chapter is based largely on the June 2000 PRRAC conference, held at Howard University Law School, "High Student Mobility/Classroom Turnover: How to Address It? How to Reduce It?" The conference was supported by grants from the George Gund Foundation and the Spencer Foundation. Roger Rosenthal of the Migrant Legal Action Program and Patricia Julianelle of the National Law Center on Homelessness and Poverty provided helpful consultation.

Chapter 17

Limited English Proficient Students and High-Stakes Accountability Systems

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Chapter 18

New Research on Special Education and Minority Students with Implications for Federal Education Policy and Enforcement

Daniel J. Losen is a Legal and Research Associate with The Civil Rights Project at Harvard University (CRP). He was the Principal Investigator for CRP's Conference on Minority Issues in Special Education and is editing a compilation of the independent research presented at the conference, now slated for publication by The Harvard Education Publishing Group. He recently co-authored a chapter, *The Role of Law in Policing Abusive Disciplinary Practices: Why School Discipline is a Civil Rights Issue*, with Harvard Law Professor Christopher Edley, Jr., for the book, "Zero Tolerance: Resisting the Drive For Punishment in Our Schools," published by The New Press this fall.

Upon graduating law school, Mr. Losen practiced education law for economically disadvantaged students as a legal services advocate. Before becoming a lawyer, Mr. Losen taught in public schools for nearly 10 years.

Chapter 19

Blueprint for Gender Equity in Education

Verna L. Williams is an assistant professor at University of Cincinnati College of Law, where she teaches family law and sex discrimination. She was lead counsel in *Davis v. Monroe County Board of Education*, in which the U.S. Supreme Court held that Title IX requires schools to address student-to-student sexual harassment, and has written extensively about sex discrimination in educational institutions.

Digital Divide

Chapter 20

The Progress and Proposals for a Civil Rights Agenda in the Communications Policy Arena

Mark Lloyd is the Executive Director of the Civil Rights Forum on Communications Policy, a nonprofit, nonpartisan project he co-founded to bring civil rights principles and advocacy to the communications policy debate. Previously, Mr. Lloyd worked as General Counsel to the Benton Foundation, and as a communications attorney at Dow, Lohnes and Albertson in Washington, D.C., representing both commercial and noncommercial companies. He also has nearly 20 years of experience as a print and broadcast journalist, including work as a reporter and producer at NBC and CNN.

Mr. Lloyd has served as board member of dozens of national and local organizations, including the Center for Democracy and Technology, OMB Watch, Iona Senior Services, the Independent Television Service, and the Leadership Conference Education Fund. He has also served as a consultant to the Clinton White House, the John D. and Catherine T. MacArthur Foundation, the Open Society Institute, and the Smithsonian Institution. He received his undergraduate degree from the University of Michigan and his law degree from the Georgetown University Law Center.

Chapter 21

The Adverse Consequences of a New Federal Direction

Gary D. Bass, Ph.D., is the founder and Executive Director of OMB Watch (<*www.ombwatch.org*>). For the fourth year in a row he has been identified by *The Nonprofit Times* as one of the 50 most influential people in the nonprofit sector.

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Ellen Taylor is a Senior Policy Analyst with OMB Watch. She works on tracking federal budget issues and working with nonprofit groups to encourage greater understanding of and participation in the budget process, especially as it impacts low-income and vulnerable people and communities. She also coordinates the Social Investment Initiative, an effort to involve state and local organizations in making recommendations about federal budget priorities and encouraging public officials to make domestic investment a policy and budget priority.